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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 81.

HENRY CHOTEAU, PETITIONER,

vs.

DAVID BURNET
ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 14, 1930

CERTIORARI GRANTED MAY 19, 1930

(34,946)

(34,946)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1930

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BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 23792

[fol. 1] HENRY CHOTEAU, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

For Taxpayer: T. J. Leahy, Esq., Pawhuska, Okla.
For Comm'r: S. S. Faulkner, Esq.

DOCKET ENTRIES

1927.

Feb. 7. Petition received and filed. Taxpayer notified.
Feb. 9. Copy of petition served on General Counsel.
Mar. 28. Answer filed by G. C.
Apr. 6. Copy of answer served on taxpayer. Assigned general calendar.

1928

Mar. 26. Motion to advance hearing—May 15, '28 or thereafter—filed by taxpayer.
Mar. 28. Motion granted to May 15, 1928.
May 15. Hearing had before Mr. Sternhagen. Submitted. Stipulation filed. Taxpayer's brief to be filed, respondent to 6/18/28 to answer & taxpayer reply due July 9, '28. See 23272.
May 17. Transcript of hearing of May 15, 1928, filed.
May 25. Brief filed by taxpayer.
May 28. Copy of brief served on G. C.
June 18. Brief filed by G. C. See 23272.
June 30. Reply brief filed by taxpayer.

1929

Jan. 14. Opinion rendered. Mr. Sternhagen. Judgment will be entered for the respondent.
Feb. 9. Judgment redetermining deficiency entered.
Feb. 9. Motion to have Board make findings and designate them as all the facts filed by G. C.

Feb. 11. Order that motion and these findings of facts and order be filed as part of the record in this proceeding, entered.
Feb. 14. Order fixing amount of bond $716.02 entered. (1)
Feb. 14. Supersedeas bond for $716.02 approved & ordered filed.
Mar. 14. Petition for review by U. S. Cir. Ct. of Ap. (8) with assignments of error filed by taxpayer.
Mar. 14. Proof of service filed.
[fol. 2] Mar. 14. Praecipe filed.
Mar. 14. Proof of service of praecipe filed.
Mar. 14. Statement of evidence lodged.
Mar. 14. Proof of service of statement for hearing 3/30/29 filed.
Mar. 21. Statement of evidence approved & ordered filed.

Now, March 26, 1929, the foregoing Docket Entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PETITION—Filed Feb. 27, 1927.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:PA:4:0-60D RO'L, dated December 20, 1926, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual and a resident of Ralston, Oklahoma.

2. The notice of deficiency, a copy of which is hereto attached and marked "Exhibit A," was mailed to the petitioner on December 20, 1926.

3. Tax in question is income tax for the year 1918, 1919 and 1920 in which there is claimed a deficiency in tax amount-int [amounting] to $358.01. The petitioner says that for the

year 1918 he paid as income tax $122.40, for 1919, $57.55, for 1920, $551.21, making a total of $731.16 which the petitioner says he is entitled to recover instead of being liable for a deficiency as claimed by the respondent.

4. The determination of tax as set forth by the respondent in said notice of deficiency is based on the following error:

(a) In his determination the respondent holds that the bonus and royalty received by the petitioner as a member of the Osage Tribe of Indians is subject to the payment of an income tax.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

[fol. 3] (a) The petitioner is a member of the Osage Tribe of Indians, duly enrolled as such under the Act of Congress of June 28, 1906. That he received during the years in question his pro rata part of the bonuses and royalties received by the Osage Tribe of Indians from oil and gas mining leases, made by said tribe with the approval of the Secretary of the Interior on oil and gas mineral resources belonging to said tribe and held in trust by the United States. The bonus and royalty was received by the United States and held in trust for the tribe until disbursed as provided by law.

6. The petitioner prays for a relief from the deficiency as claimed by the respondent on the following grounds and in each of the following particulars:

(a) That for the year of 1918 he recover $122.40 or be credited with an overassessment for the same for the reason that the same was a tax paid by him on his pro rata part received by him of the bonuses and royalties received by the Osage Tribe of Indians as hereinbefore set forth.

(b) That for the year of 1919 he recover $57.55 or be credited with an overassessment for the same for the reason that the same was a tax paid by him on his pro rata part received by him of the bonuses and royalties received by the Osage Tribe of Indians as hereinbefore set forth.

(c) That for the year of 1920 he recover $551.21 or be credited with an overassessment for the same for the reason that the same was a tax paid by him on his pro rata part received by him of the bonuses and royalties received by the Osage Tribe of Indians as hereinbefore set forth.

(d) That the deficiency claimed by the respondent be denied.

(d) That he have interest at the rate of 6% per annum on the above amounts from the dates on which the same were paid.

Wherefore the petitioner prays that this Board hear and redetermine the deficiency claimed.

Duly sworn to by Henry Chouteau. Jurat omitted in printing.

T. J. Leahy, Attorney for Petitioner, Pawhuska, Oklahoma.

[fol. 4] EXHIBIT A TO PETITION

Treasury Department, Office of Commissioner of Internal Revenue, Washington, Dec. 20, 1926.

IT:PA:4:0-60D RQ'L.

Mr. Henry Chouteau, Roll #1142, c/o Mr. T. J. Leahy, Attorney, Pawhuska, Oklahoma.

SIR: The determination of your income tax liability for the years 1918, 1919 and 1920 discloses a deficiency in tax amounting to $358.01, as set forth in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, [fol. 5] you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4:0-60D-RO'L. In the event that you acquiesce in a part of the determination the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

Statement

IT:PA:4-0-60D. RO'L

In re Mr. Henry Chouteau, Roll # 1142, % Mr. T. J. Leahy, Attorney, Pawhuska, Oklahoma.

Year	Deficiency in tax
1918 (Waiver)	$40.64
1919 (Waiver)	68.98
1920 (Waiver)	248.39
Total	$358.01

An audit of the income tax returns as filed for the above-mentioned years indicates the following adjustments:

1918

Net income reported		$4,240.00
Bonus and royalties received	$5,910.00	
Bonus and royalties reported	3,940.00	
		1,970.00
		$6,210.00
Less: Depletion		1,292.69
Net income adjusted		$4,917.31
Less: Personal exemption and credit for dependents		2,200.00
Amount subject to normal tax at 6%		$2,717.31
[fol. 6] Amount of tax at 6%		$163.04
Tax previously assessed		122.40
Deficiency		$40.64

1919

Net income reported		$2,438.77
Bonus and royalties received	$7,470.00	
Bonus and royalties reported	3,894.64	
		3,575.36
		$6,014.13
Brought forward		$6,014.13
Less: Depletion		1,850.92
Net income adjusted		$4,163.21
Less: Personal exemption		1,000.00
Amount subject to normal tax at 4%		$3,163.21
Amount of tax at 4%		$126.53
Tax previously assessed		57.55
Deficiency		$68.98

1920		
Net income reported		$8,920.18
Depletion claimed	$5,250.00	
Depletion allowed	3,090.24	
		2,159.76
Net income adjusted		$11,079.94
Less: Personal exemption		1,000.00
Amount subject to normal tax		$10,079.94
Amount subject to tax at 4%		4,000.00
Amount subject to tax at 8%		$6,079.94
Amount of tax at 4%		$160.00
Amount of tax at 8%		486.40
Surtax on $11,079.94		153.20
Total		$799.60
Tax previously assessed		551.21
Deficiency		$248.39

[fol. 7] Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, March 26, 1929, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed March 28, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph (1) of the petition.

2. Admits the allegations contained in paragraph (2) of the petition.

3. Admits that the deficiencies are in the amounts and for the years as alleged in paragraph (3) of the petition, but denies all other allegations contained in said paragraph.

4. Denies that the Commissioner erred in respect to the matters set forth in paragraph (4) of the petition.

5. Denies the allegations contained in paragraph (5) of the petition.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, General Counsel Bureau of Internal Revenue. Of Counsel: Shelby S. Faulkner, Special Attorney, Bureau of Internal Revenue.

Now, March 26, 1929, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 8] BEFORE U. S. BOARD OF TAX APPEALS

OPINION

Promulgated January 14, 1929

T. J. Leahy, Esq., for the petitioner.
Shelby S. Faulkner, Esq., for the respondent.

Sternhagen: This proceeding was submitted with that of Mary Blackbird, Docket No. 23272, 14 B.T.A. The Commissioner determined deficiencies of individual income tax of $40.64 for 1918, $68.98 for 1919, and $248.39 for 1920. Petitioner seeks to set aside these deficiencies and also claims overpayment of amounts already paid for such years.

The case is submitted on a stipulation of facts which is as follows:

It is hereby stipulated and agreed by and between the above-named petitioner and the above-named respondent, through their respective attorneys, that the following is a true and correct statement of the facts involved in this controversy, and that the Board of Tax Appeals may accept the same as a true, correct, and complete statement of the facts involved, in conjunction with the petition and answer filed in this case, and render judgment thereon.

(1) The petitioner, Henry Chouteau, is a member of the Osage Tribe of Indians, duly enrolled and alloted as such under the Act of Congress of June 28, 1906 (34 Stat. at L., 539) and has a certificate of competency as provided for in said Act of Congress, said certificate of competency having been issued on March 5, 1910, a copy of said certificate being attached hereto and made a part hereof, marked as Exhibit A.

(2) Henry Chouteau, the petitioner, was also during the years 1918, 1919, 1920 the owner of one-half share or allotment which he had received by inheritance from another member of the Osage Tribe of Indians, who was duly enrolled and allotted as such. The petitioner, during the years 1918, 1919 and 1920 was therefore the owner of one and one-half shares or allotments, representing his own share or allotment which he had received by way of inheritance.

(3) During the year 1918 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $3,940.00 and from the inherited one-half share or allotment that was owned by him, the sum of $1,970.00. Upon the total income so received petitioner paid, as income tax, the sum of $122.40.

[fol. 9] (4) During the year 1919 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $4,980.00 and from the inherited one-half share or allotment that was owned by him, the sum of $2,490.00. Upon the total income so received petitioner paid, as income tax, the sum of $57.55.

(5) During the year 1920 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $9,900.00 and from the inherited one-half share or allotment that was owned by him, the sum of $4,950.00. Upon the total income so received petitioner paid, as income tax, the sum of $551.21.

(6) The amounts received by the petitioner were paid to him through the Osage Indian Agency at Pawhuska, Oklahoma.

(7) All of the said income received by the petitioner during the years 1918, 1919 and 1920 was his pro rata part of the income of the Osage Tribe of Indians which was received during the said years from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under said Act of Congress of June 28, 1906. The oil and gas mineral leases were upon a part of the lands originally bought for the Osage Tribe of Indians by the United States with money belonging to said tribe and held in trust for said tribe by the United States, said lands having been purchased from the Cherokee Tribe of Indians, and deeded to the United States to be held in trust by it for the said Osage Tribe of Indians. A true copy of the aforementioned deed, marked Exhibit "B", is attached hereto and made a part hereof.

(8) The lands aforesaid were purchased from the Cherokee Tribe of Indians with funds theretofore realized from the sale of lands of the Osage Indians located in the State of Kansas.

(9) The parties agree that the Board may take judicial notice of all pertinent statutes and treaties.

(10) The computations as to amounts, and the depletion allowed as shown by the deficiency letter are correct.

Following Mary Blackbird, 14 B.T.A., and Leah Brunt, etc., 5 B.T.A. 134.

Judgment will be entered for the respondent.

[fol. 10] Now, March 26, 1929, the foregoing Opinion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

JUDGMENT—Feb. 9, 1929

Pursuant to the Board's report of January 14, 1929, it is

Ordered, Adjudged and Decided that there are deficiencies in income tax of $40.64, $68.98 and $248.39 for 1918, 1919 and 1920, respectively.

Enter.

(Signed) John M. Sternhagen, Member United States Board of Tax Appeals.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

Now, March 26, 1929, the foregoing Judgment certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

MOTION TO MAKE FINDINGS OF FACT—Filed Feb. 9, 1929

Comes now the Commissioner of Internal Revenue, respondent in the above-entitled cause, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the Board make findings and designate them as such of all of the facts set forth in the stipulation filed with the Board, leaving out the details of petitioner's Exhibits A and B appended to said stipulation and merely making a reference to those exhibits.

In support of this motion, it is shown to the Board that the petitioner in the above-entitled cause is filing or is about to file a petition with the Board to have its decision reviewed by the United States Circuit Court of Appeals [fol. 11] for the Eighth Circuit. Since the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of the Kendrick Coal and Dock Company v. the Commissioner of Internal Revenue, decided November 7, 1928,

there is some doubt as to whether or not the Board may render an opinion without findings of fact as it did in this case. The above-entitled cause is a test case and a decision by an appellate court upon the merits will dispose of numerous cases now pending before the Board and awaiting a final decision in this case. If the Circuit Court of Appeals should remand this case to the Board to make findings of fact, such procedure will only delay a final determination of the question involved.

Wherefore, it is prayed that the motion of the respondent be granted.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

BDM.

No objection. T. J. Leahy, Attorney for petitioner.

Now, March 26, 1929, the foregoing Motion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

ORDER ON MOTION TO MAKE FINDINGS IN FACT—Feb. 11, 1929

Subsequently to the promulgation of the opinion in this proceeding, counsel for the parties under date of February 9, 1929, filed a motion that the stipulated facts set forth in the Board's opinion be expressly found as facts and that the findings so made should be expressly designated. For the reasons set forth in such motion the Board makes the following findings of fact in accordance with the stipulation of the parties set forth in the opinion aforesaid:

(Findings of fact omitted, being identical with paragraphs numbered (1) to (10) of the stipulated facts set forth in the opinion herein, except as to paragraph (9), which in the order reads as follows:

[fol. 12] (9) "(This paragraph of the stiplation is omitted from the findings because it is obviously not a stipulated fact)."

Ordered that the aforesaid motion and these findings of fact and order be filed as part of the record in this proceeding.

(Signed) John M. Sternhagen, Member United States Board of Tax Appeals.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

Now, March 26, 1929, the foregoing Order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR THE REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPALS—Filed March 14, 1929

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Henry Chouteau in support of this, his petition, filed in pursuance with the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled the Revenue Act of 1926, for the review of the decision of the United States Board of Tax Appeals rendered on the 14th day of January, 1929, approving a deficiency in income and profits taxes of the petitioner for the years 1918, 1919 and 1920 in the amount of $358.01 as shown by the final notice of deficiency previously mailed by the respondent under date of December 20, 1926. The said petition alleges in substance as follows:

1. That the petitioner is an individual and a resident of Ralston, Oklahoma. That the notice of deficiency was mailed to the petitioner on December 20, 1926. That the tax in question is income tax for the years 1918, 1919 and 1920, in which there was claimed a deficiency in tax amounting to $358.01. That this petitioner for the year 1918 paid as income tax $122.40; for 1919, $57.55; for 1920, $551.21,

making a total of $731.16 which the petitioner says he was [fol. 13] not liable for and is entitled to have the same refunded to him by the respondent and that the tax in question which is claimed by the petitioner he is not liable for because it is sought to be collected from him contrary to law and is not authorized by law.

2. The petitioner says he is a duly allotted and enrolled member of the Osage Tribe of Indians under and by virtue of the Act of Congress of June 28, 1926, (34 Stat., at L. 539). That the tax sought to be assessed against him by the respondent was a tax on his part of the income of the Osage Tribe of Indians for the years 1918, 1919 and 1920. That siad [said] income came to him as a member of said tribe by reason of the mineral resources belonging to said tribe and which were held in trust by the United States for the use and benefit of said tribe and which money was held in trust for him by the United States until disbursed to him as provided by law. That after this petitioner filed his petition with the United States Board of Tax Appeals as above stated, the respondent filed with said Board his answer to said petition in which he admitted that this petitioner is a member of the Osage Tribe of Indians in Oklahoma and was duly allotted as such and that his income for the years 1920 and 1921 came from the source as claimed by the petitioner. And further alleged that said income was subject to be taxed under the income tax laws of the United States and that therefore, the deficiency tax assessed against the petitioner is proper and valid.

3. This cause being at issue under the rules and practice of said United States Board of Tax Appeals, the same came duly on for hearing on the 15th day of May, 1928, upon the petition and answer and the agreed statement of facts duly signed and entered into between this petitioner and the respondent. That on the 14th day of January, 1929, the United States Board of Tax Appeals rendered its final order approving the deficiency as determined by the respondent and gave judgment in favor of the respondent and against the petitioner.

4. The petitioner being aggrieved by the said findings of the said Board and being a citizen and a resident of the

State of Oklahoma, desires a review thereof as provided by law by the United States Circuit Court of Appeals for the Eighth Circuit within which circuit is located the office of the Collector of Internal Revenue to whom the said petitioner made his income and profits tax return.

[fol. 14] 5. The petitioner as a basis for review makes the following assignments of error:

(a) The Board of Tax Appeals erred in holding that his income of the petitioner derived by him from the Osage Tribe of Indians as a member of said tribe and from the income of said tribe which was held in trust by the United States of America for said tribe, was upon distribution to him subject to the payment of an income tax.

(b) The Board of Tax Appeals erred in rendering judgment for the respondent.

Wherefore, your petitioner prays that this Honorable Court may review said findings, decision, opinion and order and reverse and set aside the same and that the clerk of the said United States Board of Tax Appeals be directed to transmit and deliver to the clerk of said court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and statute made and provided.

And your petitioner will ever pray.

T. J. Leahy, Attorney for Petitioner.

Duly sworn to by T. J. Leahy. Jurat omitted in printing.

[fol. 15] To C M Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., attorney for the Respondent.

Sir: You Will Please Take Notice that on the 14th day of March, 1929, the undersigned will present to the United States Board of Tax Appeals and file with the clerk thereof, the petition of Henry Chouteau, a copy of which is annexed hereto for the review by the United States Circuit Court of Appeals for the Eighth Circuit, of the final order and decision of the said Board in the above entitled proceeding en-

tered upon the records of the said Board on the 14 day of January, 1929.

Dated Washington, D. C. March 14th 1929.

T. J. Leahy, Attorney for Henry Chouteau.

Copy of within notice and copy of Petition for Review is hereby accepted this 14th day of March, 1929.

(S.) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, March 26, 1929, the foregoing Petition for Review with proof of service thereon certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Boards of Tax Appeals.

(Seal.)

Before U. S. Board of Tax Appeals

Statement of the Evidence—Filed Mar. 21, 1929

The above entitled cause came on for hearing before the Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals on the 15 day of May, 1928, there being present the petitioner, by her counsel T. J. Leahy, and the respondent by his counsel, Shelby S. Faulkner. Thereupon this cause was submitted to the United States Board of Tax Appeals upon the petition of the petitioner and the answer of the respondent and the following agreed statement of facts:

(Stipulation omitted, same being set forth in full in the opinion printed herewith.)

[fol. 16] There being no other or further evidence submitted in the trial of this cause.

T. J. Leahy, Attorney for Petitioner.

The foregoing contains all the evidence given at the hearing of this proceeding and this statement of the evidence is duly stated, approved and signed and ordered to

be made of record in the above-entitled cause this 21st day of March, 1929.

(S.) J. M. Sternhagen, Member United States Board of Tax Appeals.

Mar. 20, 1929.

Approved:

C. M. Charest, General Counsel, Bureau of Internal Revenue.

EXHIBIT A

Allotment No. 1071

Whereas, Henry Chouteau, a member of the Osage Tribe of Indians, has made application for the issuance of a Certificate of Competency under the provisions of paragraph 7 of Section 2 of the Act of Congress approved June 28, 1906 (34 Stat. L., 539-542); and,

Whereas, upon investigation, consideration and examination of the request, Henry Chouteau has been found to be fully competent and capable of transacting his own business and caring for his own individual affairs.

Now, Therefore, the First Assistant Secretary of the Interior, by virtue of the power and authority vested in him by paragraph 7 of Section 2 of said Act of Congress of June 28, 1906, does hereby issue to said Henry Chouteau, this Certificate of Competency, and does hereby invest him with full power and authority to sell and convey any or all surplus lands deeded him under the provisions of said Act of Congress, except the minerals therein, which are reserved for the use of the Osage Tribe for a period of twenty-five years from April 8, 1906, and does hereby declare him to be fully competent and capable of managing and caring for his individual affairs.

Done at the City of Washington this Mar. 5, 1910.

Frank Pierce, First Assistant Secretary of the Interior.

[fol. 17]

EXHIBIT B

This Indenture made and entered into this fourteenth day of June A. D. eighteen hundred and eighty three, be-

tween said Cherokee Nation and the United States, the said cipal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, Witnesseth: That,

Whereas by the sixteenth Article of the treaty concluded July nineteenth, A. D. eighteen hundred and sixty six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee country west of the ninety-six degree" of west longitude, under certain limitations therein mentioned, and

Whereas under authority of an Act of Congress approved June fifth, A. D. eighteen hundred and seventy two, a certain tract of said country was set apart for the Great and Little Osage tribe of Indians, with a proviso that said Great and Little Osage tribe shall permit the settlement within the limits of said tract of the Kansas tribes of Indians; and

Whereas by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of one million, ninety nine thousand, one hundred and thirty seven and forty one hundredths dollars ($1,099,137.41) in payment for said tract of land; and

Whereas, by an Act of Congress, approved March third, A. D. eighteen hundred and eighty three, three hundred thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas River" provided "That the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior, to the United States in trust only for the benefit of the Pawnees, Poncas, Nez-Perces, Otoes and Missourias and Osages now occupying said tract as they respectively occupy the same, before the payment of said sum of money;" now,

Therefore by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty three, which recites "That

[fol. 18] Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyance as required by said Act, March third, eighteen hundred and eighty three, for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez-Perces, Otoes and Missourias and Osages, as they respectively occupy the same," said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, and of the further sum paid under the Act of March third, eighteen hundred and seventy three, as aforesaid, does by these presents bargain, sell, remise, release, relinquish, and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships and fractional townships, north, and east of the Indian Meridian—the fractional townships being on the left bank of the Arkansas River; Fractional townships twenty four (24) twenty five (25) and twenty six (26), Range two (2) East;

Fractional townships twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28) and twenty nine (29), range three (3) east;

Fractional townships twenty three (23), twenty four (24), twenty five (25), twenty six (26), and twenty seven (27), township twenty eight (28), and fractional township twenty nine (29), range four (4) east;

Fractional townships twenty three (23) and twenty four (24) townships twenty five (25) twenty six (26) twenty seven (27), twenty eight (28), and fractional township twenty nine (29) range five (5) east;

Fractional townships twenty two (22), and twenty three (23), townships twenty four (24), twenty five (25), twenty six (26) twenty seven (27), twenty eight (28) and fractional township twenty nine (29), range six (6) east;

Fractional townships twenty one (21) and twenty two (22), townships twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28) and fractional township twenty nine (29), range seven (7) east;

[fol. 19] Fractional townships twenty one (21) and twenty two (22), townships twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28), and fractional township twenty nine (29), range eight (8) east;

Fractional townships twenty (20) and twenty one (21), townships twenty two (22) twenty three (23) twenty four (24) twenty five (25) twenty six (26) twenty seven (27) twenty eight (28) and fractional township twenty nine (29) range nine (9) east; Fractional township twenty (20), townships twenty one (21) twenty two (22), twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28), and fractional township twenty nine (29), range (10) east; Fractional township twenty (20), township twenty one (21), twenty two (22), twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28) and fractional township twenty nine (29), range Eleven (11) east Fractional townships twenty (20), twenty one (21), twenty two (22), twenty three (23), twenty four (24), twenty five (25), twenty six (26), twenty seven (27), twenty eight (28) and twenty nine (29), range Twelve (12) east according to a plat of lands annexed hereto, marked "A," and made a part of this conveyance containing in all one million five hundred and seventy thousand, one hundred and ninety six and thirty hundredths acres (1,570,196.30) hereby granted. Under the act aforesaid, there has been set apart for the Kansas Indians, as provided by said act, the following numbered townships and fractional townships, being a part of the lands above described, and indicated upon the beforementioned plat;

Fractional township twenty seven (27), twenty eight (28), and twenty nine (29), range three (3) east;

Fractional township twenty seven (27), township twenty-eight (28) and fractional township twenty-nine (29), range four (4) east; The west half of sections three (3), ten (10),

fifteen (15), twenty two (22), twenty seven (27) and thirty two (32), and sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty eight (28), twenty nine (29), thirty (30) and thirty one (31), of township twenty seven (27) north, range five (5) east;

The west half of sections three (3), ten (10), fifteen (15), twenty two (22), twenty seven (27), and thirty four (34), [fol. 20] and sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty eight (28), twenty nine (29), thirty (30), thirty one (31), thirty two (32) and thirty three (33), of township twenty eight (28) north, range five (5) east;

The west half of sections three (3), ten (10), fifteen (15), twenty two (22), twenty seven (27), and thirty four (34), and sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty eight (28), twenty nine (29), thirty (30), thirty one (31), thirty two (32) and thirty three (33), of township twenty eight (28), north, range five (5) east;

The west half of sections fifteen (15), twenty two (22), twenty seven (27) and thirty four (34), and sections sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty eight (28), twenty nine (29), thirty (30), thirty one (31), thirty two (32), thirty three (33), of township twenty nine (29) north, range (5) east; containing an area of one hundred thousand, one hundred and thirty seven and thirty two hundredths acres (100,137.32), which aforesaid lands were paid for by the Osages to the Cherokees, and the Kansas Indians have paid for that portion assigned to them by proper transfer of the funds arising from the sale of their lands in Kansas; together with all and singular the hereditaments and appurtenances belonging, or in any wise appertaining to the lands hereby granted; To Have and to Hold and the said premises, as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid;

In Witness Whereof the party of the first part hath subscribed this conveyance by the said principal chief and delegates, aforesaid, who have also hereunto set their hands and seals this fourteenth day of June A. D. eighteen hundred and eighty three.

The Cherokee Nation, by Dennis W. Bushyhead, Principal Chief. (L. S.) Richard M. Wolfe, Robert B. Ross, Delegates of the said Cherokee Nation.

Signed, sealed and delivered in the presence of Jos. K. McCamman, N. P. Loveridge, Wm. A. Phillips. (Cherokee Seal.)

[fol. 21] District of Columbia,

County [City] of Washington, ss:

On this fourteenth day of June, A. D. eighteen hundred and eighty-three, before me a Notary Public in and for the District aforesaid personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed for the purpose and under the authority therein mentioned.

Geo. M. Lockwood, Notary Public. (Seal.)

Now, March 26, 1929, the foregoing Statement of Evidence certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

Before U. S. Board of Tax Appeals

Præcipe for the Record—Filed Mar. 14, 1929

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty days from date of filing of the petition for review in the above stated cause, transmit to the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, certified copies of the following document:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.

2. Pleadings before the Board, and all exhibits thereto attached.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review.

5. Stipulation of the facts and evidence agreed upon.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

T. J. Leahy, Attorney for Henry Chouteau.

February —, 1929.

[fol. 22] Mar. 20, 1929.—Consent is noted hereon—no counter præcipe to be filed.

C. M. Charest.

Now, March 26, 1929, the foregoing Præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 23] Appearances of counsel omitted in printing.

[fol. 24] In United States Circuit Court of Appeals

Stipulation for Revival of Cause and Substitution—Filed Sept. 5, 1929

It is hereby stipulated and agreed by and between T. J. Leahy, Attorney for Henry Chouteau, Petitioner, and P. C. Alexander, Attorney for Commissioner of Internal Revenue, Respondent, as follows:

That since the filing of this case in this Court David H. Blair, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above

entitled case, and had been since it was originally filed in the United States Board of Tax Appeals at Washington, D. C., has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That David H. Blair ceased to be Commissioner of Internal Revenue on the 31st day of May, 1929;

That Robert H. Lucas was duly appointed as Commissioner of Internal Revenue to succeed the said David H. Blair, and has duly qualified as said Commissioner of Internal Revenue;

That on June 1, 1929, said Robert H. Lucas became Commissioner of Internal Revenue, and ever since that time has been and now is, Commissioner of Internal Revenue.

It is further stipulated and agreed between the parties hereto that agreeably to the Court, and in accordance with the law, this cause may be revived so that this action will be pending as against the said Robert H. Lucas as Commissioner of Internal Revenue, and that said Robert H. Lucas, as Commissioner of Internal Revenue, may be substituted as the respondent in this case for the said David H. Blair, formerly Commissioner of Internal Revenue;

That there is a substantial need for so continuing and maintaining this cause and obtaining an adjudication by this Court of the questions involved therein, because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the [fol. 25] petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this Petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is further stipulated and agreed that the serving of notice on the said Robert H. Lucas, as Commissioner of Internal Revenue, of the motion of petitioner to revive this action in his name, and to have his name substituted as respondent in this case, is hereby waived, and the said P. C. Alexander, who is attorney for the said Robert H. Lucas, hereby consents that an order may be made forthwith by the Court reviving this cause in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and substituting him as respondent in this case for the former Com-

missioner of Internal Revenue, David H. Blair; and that this cause shall, agreeably to the Court, stand for argument before the Court as at present assigned.

T. J. Leahy, Attorney for Petitioner. P. C. Alexander, Attorney for Respondent.

(File endorsement omitted.)

Order

Twenty-third Day, June Term, Friday, September 6th, A. D. 1929. Before Honorable Robert E. Lewis, Honorable John H. Cotteral and Honorable George T. McDermott, Circuit Judges.

This cause comes on to be heard on a suggestion of substitution of party respondent herein, T. J. Leahy, Esquire, appearing for petitioner and Ralph T. O'Neil, Esquire, appearing for respondent.

Thereupon, on consideration thereof and pursuant to written stipulation herein filed, it is now here ordered by the court that Robert H. Lucas, Commissioner of Internal Revenue be and he hereby is substituted in this cause for and in the place and stead of David H. Blair, Commissioner of Internal Revenue, as the respondent herein.

Minute entry of argument and submission September 6, 1929, omitted in printing.

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS,
TENTH CIRCUIT,

February Term, 1930

No. 12

HENRY CHOUTEAU, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

No. 13

MARY BLACKBIRD, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On petition to Review the Decision of the United States Board of Tax Appeals

No. 14

MRS. AMARILLIS D. PETTIT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

OPINION—February 5, 1930

Mr. T. J. Leahy (Mr. C. S. MacDonald, Mr. J. H. Maxey, Mr. F. W. Files, and, in No. 13, Mr. J. M. Humphreys, Osage Indian Tribal Attorney, were with him on the briefs) for petitioners.

Mr. Preston C. Alexander (Mr. Sewall Key and Mr. Morton P. Fisher, Special Assistants to the Attorney General, Mr. C. M. Charest, General Counsel, Bureau of Internal

Revenue, and Mr. Shelby S. Faulkner, Special Attorney, Bureau of Internal Revenue, were with him on the brief) for respondent.

Before Lewis, Cotteral, and McDermott, Circuit Judges

Lewis, Circuit Judge, delivered the opinion of the Court.

These are Federal Income Tax Cases. The Board of Tax Appeals affirmed a deficiency order made by the Commissioner against each of the petitioners. The cases were argued and submitted together, but are different in their facts.

1. Mary Blackbird is a restricted full-blood member of the Osage Tribe of Indians. As such member she received her allotments under the Osage Allotment Act of June 28, [fol. 27] 1906 (34 Stat. 539), and she inherited a third interest in the allotment of another member. The claimed deficiencies against her are for the years 1920 and 1921. All the lands that were allotted under the Act were purchased by the United States from the Cherokee Nation in 1883 with funds that belonged to the Osage Tribe, and the title thereto taken in the name of the United States in trust for the use and benefit of the Osages. Each member of the tribe, appearing on the roll provided for in the Act, made three selections of 160 acres each, one of which was designated as a homestead; and the remainder of the lands was then equally divided between them. Section 2 of the Act made the homestead allotment inalienable and non-taxable for a period of 25 years, and the remainder of the lands so divided inalienable for 25 years, unless the allottee procured from the Secretary of the Interior a certificate of competency which would authorize him to sell and convey all of his allotted lands except his homestead. The certificate of competency would also immediately render the lands (except the homestead) subject to taxation and in any event they were taxable on the expiration of three years from the approval of the Act. Mary Blackbird has never had a certificate of competency. The oil, gas, coal and other minerals covered by the allotted lands were reserved by the Act to the use of the tribe for a period of 25 years,—now extended to April 8, 1958, by the Act of March 2, 1929

(45 Stat. 1478),—thus segregating the mineral deposits from all of the allotted lands for a term of years. The mineral deposits, particularly of oil and gas, under much of the land has proved to be of great value. The Allotment Act authorized the tribe, through its tribal counsel, and with the approval of the Secretary of the Interior, to grant leases for extraction of these minerals and provided that the royalties received therefrom should be placed in the treasury of the United States to the credit of the members of the tribe and distributed to the individual members according to the tribal roll provided for in the Act, in the manner and at the same time that payments were made of interest on other moneys held in trust for the Osages by the United States, each member receiving his prorata share. There were other funds held then and now by the United States that belonged to the tribe, and they also were to be placed to the credit of the members on a basis of a prorata division among them, as shown by the tribal roll. By the Act all property interests of intestate deceased members descend to his or her legal representatives according to the laws of Oklahoma. The principal part of Mary Blackbird's gross income for the two years was her share of bonuses and royalties on tribal mineral leases. However, she re-[fol. 28] ceived $480 each year as surface rental from the homestead allotted to her, $100 each year as interest on funds held in trust for her by the United States, and a few additional dollars from miscellaneous sources. She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with. Elk v. Wilkins, 112 U. S. 94, 100: "General acts of Congress

did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." In Choate v. Trapp, 224 U. S. 665, the court, after noting the general rule that exemptions from taxation are to be strictly construed, said at page 675:

"But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

Cases are cited. This is the view taken of the matter by the Attorney General in several opinions. 34 Op. Atty. Gen'l: 439; 35 Op. Atty. Gen'l. 1,107. In the first opinion cited the Attorney General among other things said:

"This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians. Choctaw Nation v. United States, 119 U. S. 1; United States v. Choctaw Nation, 179 U. S. 494; Seufert Bros. v. United States, 249 U. S. 194; Starr v. Long Jim, [fol. 29] 227 U. S. 613; United States v. Payne, 264 U. S. 446. This same rule of liberal construction has also been followed in the interpretation of statutes relative to the Indians. Cherokee Intermarriage Cases, 203 U. S. 76; United States v. Celestine, 215 U. S. 278; Choate v. Trapp, 224 U. S. 665. It is well established that general Acts of Congress do not apply to Indians, unless so worded as clearly to manifest an intention to include Indians in their operation. Elk v. Wilkins, 112 U. S. 94. The Indian has always been the object of special legislation. Never has it been the practice to legislate for him generally along with the rest of the people."

In the second opinion cited the Attorney General said this:

"The principle was emphasized that general Acts of Congress do not apply to Indians unless so worded as to mani-

fest a clear intention to include them; that Indians have always been the object of special legislation, and that general legislation, and especially revenue laws, which burden and restrict the use and enjoyment of property, should not be applied to Indians, unless Congress in clear and unambiguous language so directs. * * * Such a wide departure from the prior legislative policy should not be assumed from doubtful implication, but should be recognized as existing only upon the enactment of legislation expressly so providing."

A familiar instance of the restraint of general words and sweeping expressions in an Act is the case of Church of the Holy Trinity v. United States, 143 U. S. 457; and in United States v. Kirby, 7 Wall, 482, we find this:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The mineral reserves under the lands are held in trust by the United States for the tribe and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still recognized as dependents on Governmental care; and it seems unreasonable to hold that a general tax statute should be applied to them when they are not named nor intention in some way ex-ressed that it applies to them. Counsel for petitioner rely on The Cherokee Tobacco Case, 11 Wall. 616; but the opinion in [fol. 30] that case, as a precedent, seems to have been nullified by what is said in United States v. Forty-three Gallons of Whiskey, 108 U. S. 491. The case of Mary Blackbird is therefore reversed.

2. Mrs. Petitt is a white woman without Indian blood. She is not a member of the Osage Tribe of Indians. She inherited from her children, who were members of the Tribe, lands that had been allotted to them under the Act of June 28, 1906. All of her gross income here involved

was her pro-rata part of the income of the tribe from oil and gas leases made by said tribe with the approval of the Secretary under said Act. Her claimed deficiencies were for the years 1919, 1920, 1921 and 1922. She also claims that she is not subject to the income tax statute. Her children were without certificates of competency from the Secretary of the Interior, but we think it clear under the ruling in Levindale Lead & Zinc Co. v. Coleman, 241 U. S. 432, that their mother took their lands without any restrictions on its disposition. The United States has no control over her interests and she is in no sense its ward. She receives her share of the royalties and bonuses on the mineral deposits in accordance with the terms of the Acts, but it is not held and paid to her on the part of the Government for her protection as its dependent ward. See also Mixon v. Littleton, 265 Fed. 603. As to her the ruling of the Board of Tax Appeals is affirmed.

3. Henry Chouteau is a member of the Osage Tribe, but his quantum of Indian blood is not stated in the record. Tribal lands were allotted to him under the Osage Allotment Act and his gross income for the years in question, 1918, 1919 and 1920, was his pro-rata share from tribal mineral leases given with the approval of the Secretary under the Act of June 28, 1906. In addition to his own allotments he was the owner by inheritance of land allotted to another member of the tribe. He applied for and received from the Secretary of the Interior a certificate of competency bearing date March 5, 1910, which is provided for by the Act of June 28, 1906, paragraph 7 of section 2 of said Act reading thus:

"That the Secretary of the Interior, in his discretion at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded to him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully com- [fol. 31] petent and capable of transacting his or her own business and caring for his or her own individual affairs;

Provided, That upon the issuance of such certificate of competency the lands of such member (except his of her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States. * * *."

The certificate of competency issued to Henry Chouteau reads thus:

"Whereas, Henry Chouteau, a member of the Osage Tribe of Indians, has made application for the issuance of a Certificate of Competency under the provisions of paragraph 7 of Section 2 of the Act of Congress approved June 28, 1906 (34 Stat. L. 539-542); and,

"Whereas, upon investigation, consideration and examination of the request, Henry Chouteau has been found to be fully competent and capable of transacting his own business and caring for his own individual affairs.

"Now, therefore, the First Assistant Secretary of the Interior, by virtue of the power and authority vested in him by paragraph 7 of Section 2 of said Act of Congress of June 28, 1906, does hereby issue to said Henry Chouteau, this Certificate of Competency, and does hereby invest him with full power and authority to sell and convey any or all surplus lands deeded him under the provisions of said Act of Congress, except the minerals therein, which are reserved for the use of the Osage Tribe for a period of twenty-five years from April 8, 1906, and does hereby declare him to be fully competent and capable of managing and caring for his individual affairs.

"Done at the City of Washington this Mar. 5, 1910.

"Frank Pierce, First Assistant Secretary of the Interior."

The Act of April 18, 1912 (37 Stat. 86) also deals with certificates of competency. Section 7 in part reads:

"That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be sub-

ject to any claim against the same arising prior to grant of a certificate of competency."

[fol. 32] Apparently the purpose of the statute in authorizing the certificate and its subsequent issuance was to fully emancipate the Indian receiving it from further Governmental control and supervision of his property, except his homestead. Chouteau's gross income for the three years was wholly his pro-rata share of royalties and bonuses on the mineral produced for those years. His certificate of competency bestowed upon him unrestricted management of his affairs and gave him full power to use and dispose of his property according to his own judgment. Thereafter his pro-rata share in the mineral production was paid to him not as a ward of the Government. It was paid to him under the terms of the Act, but was not a Governmental instrumentality and means to gradually bring him to a state of competency and independence. By provision of the Act it was determined that he was competent to have exclusive management of his own affairs when the certificate was issued to him. He obtained it at his request and with the Government's consent and approval, and thereupon he assumed the same burdens that the law imposes on every other individual property owner. We think his civil status thus fixed brought him within the terms of the income tax statutes. As to him the ruling of the Board of Tax Appeals is therefore affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENT—February 10, 1930

Before Honorable Robert E. Lewis, Honorable John H. Cotteral, and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals for a review of the decision of said Board and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United

States Board of Tax Appeals, in this cause, be and the same is hereby affirmed; and that Commissioner of Internal Revenue, respondent have and recover against Henry Chouteau, petitioner, his costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed Mar. 10, 1930.

Come now the petitioner, Henry Chouteau, and shows to the court that he intends to and is now preparing a petition or application on review for a writ of certiorari to the Su- [fol. 33] preme Court of the United States to review the decision and judgment of this court filed herein on February 5th, 1930, and that under rule 29 of this court a mandate or other proper process in the nature of a procedendo shall be issued under the hand of the Clerk and the seal of the Court to the Court below on the expiration of thirty-five (35) days after the final disposition of the cause unless an order is made staying mandate.

That your petitioner is in good faith preparing and intending to file his petition or application for a review in the Supreme Court of the United States on petition for certiorari as above stated and desires that an order be entered staying the mandate for thirty (30) additional days.

Wherefore, your petitioner prays that an order be entered by this Honorable Court staying the mandate herein for thirty (30) days from and after the time it would ordinarily be issued under rule 29 as aforesaid or staying it for such time as this Honorable court might think proper in the premises.

T. J. Leahy, J. H. Maxey, C. S. MacDonald, of Tulsa, Oklahoma, Attorneys for Henry Chouteau, Petitioner.

Duly sworn to by J. H. Maxey. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—March 18, 1930

[fol. 34] Before Honorable Robert E. Lewis, Honorable Orie L. Phillips, and Honorable George T. McDermott, Circuit Judges.

This cause came on to be heard on the motion of petitioner for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the Clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] IN SUPREME COURT OF UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,946. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 81. Henry Choteau, petitioner, vs. Robert H. Lucas, Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed April 14, 1930. File No. 34,946.

FILE COPY

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APR 1
CHARLES ELM

No. 881

In the Supreme Court of the United States

October Term, 1929.

HENRY CHOTEAU, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

T. J. LEAHY,
C. S. MACDONALD,
JAMES H. MAXEY,
Tulsa, Oklahoma,
Counsel for Petitioner.

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AUTHORITIES CITED.

Act of June 28, 1906 (34 Stat. L. 539)	1, 2, 4, 5, 6, 11-15, 16, 17
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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. ____

HENRY CHOTEAU, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

May It Please the Court:

The petition of Henry Chouteau respectfully shows to this honorable court:

Summary Statement of the Matters Involved.

The petitioner, Henry Chouteau, is an Osage Indian, who was duly allotted as such under the Act of Congress of June 28, 1906 (34 Stat. L. 539).

He applied for and received from the Secretary of Interior a certificate of competency bearing date of March 5, 1910, which is provided for in paragraph seven (7), section two (2) of the act above referred to.

The proceeding was originally instituted before the Board of Tax Appeals by your petitioner filing before said Board his petition for redetermination of the deficiency claimed against him for income taxes for the years 1918, 1919 and 1920.

The petition for the redetermination of the tax filed in the United States Board of Tax Appeals appears on pages two (2) to six (6), inclusive, of the transcript of the record. The answer of the Commissioner of Internal Revenue appears on page seven (7) thereof. An agreed statement of facts was entered into which appears on pages eight (8) and nine (9) of the record.

The Board of Tax Appeals decided adversely to your petitioner, and thereupon, and in due course, he filed a petition for review thereof in the Circuit Court of Appeals of the United States for the Tenth Circuit (transcript of record, page 12). The Circuit Court of Appeals affirmed the ruling of the Board of Tax Appeals on February 5th, 1930. A full, true and complete copy of the opinion of said court appears in the transcript of record at page 26-32 thereof.

The case in the Circuit Court of Appeals was argued and submitted to that court, together with the case of *Mary Blackbird* v. *Commissioner of Internal Revenue*, and the case of *Mrs. Amarillis D. Pettit* v. *Commissioner of Internal Revenue*. Mary Blackbird is a member of the Osage tribe of Indians to whom a certificate of competency had not been granted, and Amarillis D. Pettit, a white woman and not a member of the tribe, was the mother and heir of two deceased minor members of the Osage tribe of Indians who

did not have certificates of competency and who were duly enrolled and allotted as members of said tribe under the Act of Congress of June 28, 1906 (34 Stat. L. 539), and these facts constitute the principal difference between each of the three cases, the principal income of each party coming from the same source, to-wit: the mineral interests of the Osage tribe of Indians as provided in said Act of Congress of June 28, 1906. Each of these cases were selected from a group of cases involving the same questions. The remaining cases are still pending before the Board of Tax Appeals waiting the final decision herein.

The Circuit Court of Appeals reversed the ruling of the Board of Tax Appeals in the *Blackbird* case and held, in substance, that the income tax statute Act of 1918 (40 Stat. 1057) did not apply to her because she had never received a certificate of competency, but, as above stated, affirmed the ruling of the Board of Tax Appeals in this case because Henry Chouteau did have a certificate of competency and was, therefore, no longer a ward of the government, and, also, affirmed the ruling in the *Pettit* case because she was not a member of the Osage tribe of Indians and was not a ward of the government.

The income of your petitioner for the years in question (1918, 1919 and 1920) was his *pro rata* share from the tribal mineral leases given with the approval of the Secretary of Interior under the Act of June 28, 1906, above referred to and involves no other income whatsoever.

Petitioner alleges that, he being a member of the Osage tribe of Indians and duly enrolled as such is and was a

ward of the government, and his income for the years in question (1918, 1919 and 1920) being derived solely from his *pro rata* share of the bonuses and royalties on mineral leases made by the Osage tribe of Indians through its tribal council with the approval of the Secretary of the Interior, under the provisions of said Act of June 28, 1906, above referred to, said funds are not subject to an income tax; that the Osage tribe of Indians is not included among those persons, firms, corporations, *et al.*, required to file an income tax return; that the Congress of United States may not impose a tax under the Constitution of the United States on the income received by said tribe of Indians, nor has it attempted to do so; and the income of the tribe not being subject to a tax, it cannot be subjected thereto upon distribution to the individual members thereof, or their heirs, for the reason that it would be taxing income which was exempt from taxation at its source.

Reasons Relied on for the Allowance of the Writ.

I.

Petitioner asks for a review and reversal of the judgment of the Circuit Court of Appeals in holding that your petitioner is no longer a ward of the government for the reason that a certificate of competency had been issued to him under paragraph seven (7), of section two (2) of the Act of June 28, 1906, above referred to, and contends that in such conclusion said court overlooked the applicable provisions of the Act of June 28, 1906, and the following supplementary and amendatory acts thereof, to-wit:

Act of April 18, 1912 (37 Stat. L. 86);

Act of March 3d, 1921 (41 Stat. L. 1249);
Act of April 12, 1924 (43 Stat. L. 94);
Act of February 27, 1925 (43 Stat. L. 1008);
Act of March 2, 1929 (45 Stat. L. 1478).

And overlooked the proposition that the certificate of competency did not remove the restrictions on your petitioner's interest in the mineral interests of the Osage tribe of Indians, and the same is still held in trust for him by the United States, and, also, overlooked the fact that it was not until March 3, 1921, that restrictions against alienation of Chouteau's homestead were removed regardless of quantum of blood.

II.

That your petitioner asks for a review of the judgment of the Circuit Court of Appeals for the reason that it decided an important question of federal law which has not been and should be settled by this court as to whether or not the income of the Osage tribe of Indians derived from tribal sources is subject to the income tax laws of the United States on distribution to the members of said tribe and contends that the issuance to him of the certificate of competency, under the provisions of the Act of June 28, 1906, does not in view of other applicable sections of the federal statutes (above referred to) have the effect of discontinuing the wardship existing between your petitioner and the government of the United States, but that said Act of Congress specifically continues the wardship existing between your petitioner and the government of the United States.

III.

Your petitioner asks for a review of the decision of the Circuit Court of Appeals where it held, in effect, that although the bonuses and royalties from mineral leases on tribal property were paid to the government of the United States, and, after the expenses of said tribal government and tribal affairs were paid out of the same, the remainder was distributed by the government to the individual members of the tribe as provided in the Acts of Congress of June 28, 1906, March 3d, 1921, and February 27, 1925, *supra*, was subject to an income tax when paid to members of the tribe having certificates of competency, overlooking the fact that said bonuses and royalties so long as held by the United States was trust property held for the use and benefit of said Osage tribe of Indians, and the members thereof, and was, therefore, not included within the various income tax laws of the United States.

IV.

Petitioner asks for a review and reversal of the findings and conclusions of said Circuit Court of Appeals on the ground and for the reason that an Indian tribe is not included among those persons, firms, corporations, *et al.*, required to file an income tax return, and, therefore, it is evident that Congress did not intend to make such income subject to a tax either as to the tribe or on distribution to the members thereof. The income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States for the reason that the tribe is a semi-dependent political entity and not brought

within the provisions of the taxing power of the United States under its constitution; that since it was not the intention of Congress to tax the income of the Indian tribes, and since the income of such tribes may not be taxed, the same cannot be taxed upon distribution to the members thereof, or their heirs.

—*Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429.

That the income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States and the Sixteenth Amendment thereof, nor has it attempted to do so.

V.

Petitioner asks for a reversal of the findings and conclusions of said Circuit Court of Appeals for the reason that they have decided a federal question in a way probably in conflict with the applicable decisions of this court, and contends that the rule announced by this court in the cases of *LaMotte* v. *United States*, 254 U. S. 570; *United States* v. *Ramsey*, 271 U. S. 467; *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 95, are in conflict with the decision of said Circuit Court of Appeals.

VI.

Your petitioner asks for a review and reversal of the judgment of the Circuit Court of Appeals for the reason that it is in conflict with the decision of the Circuit Court of Appeals of the United States for the Third Circuit in the case of *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36.

VII.

Your petitioner also asks for a review and reversal of the judgment of the Circuit Court of Appeals on the ground and for the reason that the income of the tribe derived from mineral resources is a part of the capital assets of the tribe and does not constitute income to the members thereof on distribution as defined by the income tax laws of the United States.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket "No. 12, *Henry Chouteau, petitioner*, v. *Commissioner of Internal Revenue, respondent;*" and that the judgment and decree of the United States Circuit Court of Appeals for the Tenth Circuit may be reviewed by this honorable court; and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

T. J. Leahy,
C. S. Macdonald,
James H. Maxey,
Tulsa, Oklahoma,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Tenth Circuit has not been as yet officially reported. It was rendered on February 5, 1930, and is copied in full in the record filed in this court on pages 26-32 (Print)

II.

Jurisdiction.

Jurisdiction of this court is conferred by the judicial code, section 240 A, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this court adopted June 5, 1928, effective July 1st, 1928, and that the date of the judgment to be reviewed is February 5, 1930, and that no petition for rehearing was filed in the Circuit Court of Appeals.

III.

Statement of Case.

A statement of the case has been given in the petition and, in the interest of brevity, will not be repeated here.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in affirming the ruling and decision of the Board of Tax Appeals.

2. The Circuit Court of Appeals erred in holding that your petitioner was not a ward of the government of the United States.

3. The Circuit Court of Appeals erred in holding and concluding that the issuance to your petitioner of a certificate of competency under the provisions of the Act of June 28, 1906, had the effect of discontinuing the wardship existing between your petitioner and the government of the United States.

4. The Circuit Court of Appeals erred in holding in effect that the income of the Osage tribe of Indians from their mineral resources was not so impressed with a trust so as to exempt the income of your petitioner as a member of said tribe from taxation on his *pro rata* part of the same.

5. That the Circuit Court of Appeals erred in not holding and concluding (as contended by petitioner in that court) that an Indian tribe is not included among those persons, firms, corporations, etc., required to file an income tax return, and that, therefore, Congress did not intend to tax said income either to the tribe or on distribution.

6. That the Circuit Court of Appeals erred in not holding and concluding (as contended by your petitioner) that the income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States, and that Congress had not attempted to impose such a tax.

7. That the Circuit Court of Appeals erred in refusing to hold (as contended by your petitioner) that, inasmuch as

the income of the tribe was not subject to a tax, it could not become subject thereto upon distribution to the individual members thereof, or their heirs.

8. The Circuit Court of Appeals erred in not holding that the income of said Osage tribe derived from mineral resources was part of the capital assets of said tribe and, therefore, not subject to tax on distribution to the members thereof.

Argument—*Summary.*

The Act of June 28, 1906, entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," provided, among other things, that the lands of the tribe (with certain exceptions) should be divided among the members thereof by giving to each his or her fair share thereof in acres, and providing that each member should be entitled in his first selection to one hundred sixty (160) acres, and that after each member had made his first selection he should be permitted to make a second selection of one hundred sixty (160) acres, and that, after each member had made his second selection, he should be permitted to make a third selection of one hundred sixty (160) acres, and that he should designate which one of his selections should be his homestead, and his certificate of allotment and deed should designate the same as such.

It is also provided that, after each member had made his first, second and third selections of one hundred and sixty (160) acres, the remaining lands of the tribe (with

certain exceptions) should be divided as equally as practicable among the members by a commission to be appointed to supervise the selection and division thereof.

The minerals under all of the Osage lands were expressly reserved to the tribe by section 3 of said act, which is as follows:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided,* that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: And *provided further,* that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however,* that nothing herein contained shall be construed as affecting any valid existing lease or contract."

All funds belonging to the tribe and money due or that might become due, were to be held in trust by the United States for a period of twenty-five (25) years from and after January 1, 1907 (with certain exceptions).

The first subdivision of section 4 of the act is as follows:

"That all the funds of the Osage tribe of Indians and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage Tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, that if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And *provided further*, that said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

The second subdivision of said section is as follows:

"That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be

placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the Unites States, except as herein provided."

After the expiration of the period of twenty-five (25) years from January 1, 1907, the lands, mineral interests and moneys, provided in said act to be held in trust, should become the absolute property of the individual members of the tribe according to the rolls provided for in the acts unless otherwise provided by Act of Congress. This trust period has now been extended by the Act of March 2nd, 1929 (45 Stat. L. 1478), until January 1, 1959, unless otherwise provided by Act of Congress.

Section nine of the Act of June 28, 1906, *supra*, provided for the biennial election of officers for the Osage tribe. It is as follows:

"That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be

elected for a period of two years, commencing on the first day of July, following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

It will, therefore, be observed that the oil, gas and other mineral rights were not allotted in severalty to the various members of the tribe but were reserved to said tribe in common; that the lands should be leased by the tribe through its tribal council with the approval of the Secretary of the Interior—funds derived therefrom to be deposited in the Treasury of the United States to the credit of the members of the tribe and to be thereafter disbursed to the individual members, according to the roll in the manner and at the same time payments are made of interest on other funds held in trust for the Osages by the United States government.

It will be observed that Congress preserved the tribal government of the Osages and provided a manner in which their officers should be elected and authorized such officers to act for the tribe in its semi-sovereign capacity.

The certificate of competency issued to your petitioner, under sudivision seven (7) of section two (2) of said act, authorized your petitioner to sell and convey any of the *lands deeded to him (except his homestead), but it did not authorize him to sell the oil, gas, or other minerals* covered

by said lands, which minerals were expressly reserved to the use of the tribe, nor did not authorize him to sell, or convey his interest (or any part thereof) in the mineral underlying the original reservation, which was allotted in severalty under the Act of 1906, or said tribe, and, as to said minerals, he is still restricted.

As above stated, *the mineral rights have never been allotted in severalty, nor has any member of the Osage tribe, regardless of quantum of blood, or the issuance of a certificate of competency, ever been authorized by Congress to sell or dispose of his interest in said minerals so reserved to the tribe,* and the court below was in error when it held that the effect of the above section was to fully emancipate the Indian receiving it (certificate of competency) from further governmental control and supervision of his property except his homestead.

The Act of April 12, 1924 (34 Stat. L. 94), being an act amendatory of the Act of June 28, 1906, provides that any right to, or interest in, the lands, moneys, or mineral rights as provided in the Act of Congress approved June 28, 1906, and amendatory and supplementary acts thereof, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior, and not otherwise, be sold, assigned and transferred under such rules and regulations as the Secretary of the Interior may prescribe.

There is no Act of Congress authorizing any member of the tribe, whether he had a certificate of competency or not and regardless of quantum of blood, to sell, assign or

transfer his interest in the tribal mineral properties, or in any other tribal property.

Supporting Reasons—*Number 1.*

Your petitioner has been consistently dealt with by Congress of the United States as a ward since the passage of the Act of June 28, 1906.

The Act of April 18, 1912 (37 Stat. L. 86), section 3, gives the County Courts of Oklahoma jurisdiction in probate matters to appoint guardians and administer all estates of the allottees of said tribe without regard to the fact of whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

It will be noticed that this act makes no distinction between those members of the tribe that have a certificate of competency and those that do not have the same. If your petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend regularly and control a proceeding instituted by him in the County Court of Oklahoma?

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or

all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided*, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood.

Section 5 of this act is as follows:

"No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

"Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *Provided*, that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with your petitioner, he being an Osage Indian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

That your petitioner is a ward of the government—see *LaMotte v. United States*, 254 U. S. 570.

Supporting Reasons—*Number II.*

We submit that the court below erred in holding that the money paid to this petitioner, as his part of the proceeds of the Osage tribe of Indians derived from the mineral interests of said tribe, was subject to an income tax, and that this petitioner because of having a certificate of competency was in a different position from that of Mary Blackbird as to whom the Circuit Court of Appeals held that because she was an Indian without a certificate of competency her income was not subject to the payment of an income tax.

34 Ops. Attorney General 439, wherein the Attorney General held that the income of Quapaw Indians derived from their restricted lands was not subject to the payment of a federal income tax.

—*Elk* v. *Wilkins*, 112 U. S. 95;
Lewellyn v. *Colonial Trust Co.*, 17 Fed. (2d) 36;
Choate v. *Trapp*, 224 U. S. 665.

Supporting Reasons—*Number III.*

The Osage Tribe of Indians is not included among those persons, firms, corporations, et al., required to file an income tax return.

These tribes have been repeatedly held by various decisions of this court to be a semi-dependent political body with certain rights to govern themselves and to control their internal affairs unless the same is taken away from them by Act of Congress or by treaty.

—*Cherokee Nation* v. *Georgia*, 5 Peters 1;
United States v. *Lariviere*, 93 U. S. 192;
United States v. *Kagama*, 118 U. S. 375;

See Treaty of November 10, 1808, between United States and Osage Tribe of Indians (Kappler's Laws and Treaties, Vol. 2, p. 95), and subsequent treaties.

It is certain that Congress has not required an Indian tribe to file an income tax return or a fiduciary return showing the distributive interests of members of the tribe, in the income of the tribe as Congress did require of partners, firms, corporations, associations, *et cetera*.

Supporting Reasons—*Number IV.*

The income received by the Osage tribe of Indians is income which Congress may not impose a tax against under the Constitution of the United States, nor has it attempted to do so.

The Osage tribe of Indians can neither sue nor be sued without special authority given by Act of Congress (see

31 C. J. 488, and authorities cited thereunder). If Congress attempted to and could tax the income of the tribe it would make no difference as to the extent of the wrong done the tribe by reason of the income being improperly taxed. The tribe is left without remedy to have the same corrected. Congress certainly did not intend to impose a tax upon any person, corporation or entity of any character without affording to such entity a means by which it could be relieved from erroneous or illegal taxes. The doors of the courts of the land are closed to the tribe. Congress evidently had in mind either that the income of Indian tribes was not taxable or it had no intention of taxing the same. Except from the general status of an Indian tribe, the early history of the tribe and its relations to the government of the United States, there is little to be found bearing directly upon the question as to whether Congress could or could not impose a direct tax on such tribe. Evidently, however, the framers of the constitution were of the opinion that Indian tribes and the members thereof should not be subject to taxation for it is provided in section 2, article 1 of the constitution, that apportionment of representatives and direct taxes shall be made among the states, "excluding Indians not taxed." No other persons were excluded. Evidently the use of the term "excluding Indians not taxed" in connection with the term "direct taxes" implies the proposition that Indians were not to be taxed either by the state or by the federal government. The Sixteenth Amendment to the Constitution of the United States was adopted in order

to get rid of the proposition of apportionment and did not extend the power of Congress to new subjects of taxation.

Peck v. *Lowe*, 247 U. S. 165;

Stanton v. *Baltic Mining Company*, 240 U. S. 103;

Eisner v. *Macomber*, 252 U. S. 189.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 95, has never been questioned:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

Under the Constitution of the United States and the general policy of the government in all of its dealings with Indian tribes, the same was done by treaty. The policy of the government was changed so that in place of treaties all matters relating to Indian tribes and Indians were cared for by Act of Congress. Manifestly, any general Act of

Congress which does not specifically refer to Indian tribes or Indians would not include them.

—*Choate* v. *Trapp*, 224 U. S. 665.

"Every individual" is broad enough to include the officials and instrumentalities of the states, but the judiciary may well assume and does assume that Congress never intended to extend the statute to objects beyond its constitutional power, and, again, if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject-matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punish all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *United States* v. *Kirby*, 7 Wallace 482, to exemplify the rule that:

> "The laws should receive a sensible construction. General terms should be so limited in their application

as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services of any kind in the United States." See also:

United States v. *Delaware & Hudson Co.*, 213 U. S. 366.

In *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36, the Circuit Court of Appeals, Third Circuit, dealing with right to tax the Osage Indians, said:

"*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens, *Gould* v. *Gould*, 243 U. S. 151; *United States* v. *Field*, 255 U. S. 257, any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.

"*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by government on its ward will not

be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government. In support of this, reference is made to the *Quapaw Indians*, 34 Opinions Attorney General 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian:' and *Choate* v. *Trapp, supra*, where it is said: 'The construction, instead of being strict, is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with the *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 94, where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute.

We submit that the income tax statute, Act of 1918 (40 Stat. 1057), and the Act of 1921 (42 Stat. 227), which provide that "the net income of every individual" shall be subject to income tax should not be construed to apply to your petitioner.

Supporting Reasons—*Numbers V, VI and VII.*

The income of the tribe not being subject to a tax it cannot become subject to tax upon distribution to the members thereof.

If our position is correct, as hereinbefore set forth, that the income of the tribe is not subject to taxation, whether it be from want of power in Congress to provide for the taxing of the same or whether it be because Congress did not intend to tax the same, necessarily it would follow that this income when distributed among the members of the tribe is not subject to tax, because if it were taxed it would defeat the purpose of Congress in not attempting to tax it, or it would be taxing income which was immune from taxation at its source.

—*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

In the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, it is said:

> "But it may be argued that the *Pollock* case was decided before the passage of the Sixteenth Amendment to the Constitution, authorizing the Income Tax Law. In *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, which was the first case after the adoption of the Sixteenth Amendment involving the constitutionality of the Income Tax Act, the Supreme Court decided that the amendment did not confer upon Congress any new taxing power but served only to remove the limitation with reference to apportionment. It thereby removed the obstacle pointed out in the *Pollock* case, but did not change the law that *where the source is not taxable neither is the income.*" (Italics ours.)

Since the argument heretofore set out in this brief applies in principle to this proposition, it is not thought necessary to dwell at length upon the same. The control of

the United States over property as a guardian which it holds in trust for a tribe of Indians is the same in principle, so far as burdening the property with taxation is concerned, as property owned by the United States.

In 37 Cyc, page 865, it is said:

> "The United States has no authority to tax the property of the state, nor has the state power to extract revenue from the property of the federal government, and, from the nature of the case, neither will lay taxes upon its own property."

All that has heretofore been said with reference to the non-taxability of the funds coming to the petitioner by reason of his allotment as a member of the Osage tribe of Indians applies equally to the funds received by him as an heir of a member of the Osage tribe of Indians, and to interest on trust funds and rents from lands held in trust.

—*United States* v. *Bean*, 253 Fed. 1.

Section six of the Act of Congress of June 28, 1906, authorized members of the tribe to make wills, subject to the approval of the Secretary of the Interior, and in such wills the individual allottee may dispose of his or her lands, moneys and mineral interests as provided for in said Act of Congress.

Section five of said act provides that after the period of twenty-five years the lands, moneys and mineral interests referred to in said section shall become the absolute property of the individual allottees or their heirs.

Section seven provides that the surface of the land is set aside for the sole use and benefit of the individual mem-

bers of the tribe entitled thereto, or their heirs, for twenty-five years from January 1st, 1907, but that leases on said lands by the allottee, or heirs, are subject to the approval of the Secretary of the Interior.

By the Act of Congress of March 3rd, 1921, a distinction was made between members of the tribe and their heirs who do not have certificates of competency and those who do have certificates of competency in that, where members of the tribe have certificates of competency they shall continue to receive the full amount of their interest in the accumulated funds of the tribe quarterly, while, if they do not have certificates of competency, they may only receive $1,000.00 quarterly, the remainder of the accumulated funds belonging to such Indian, whether coming from his own allotment or as an heir of another Indian shall be disposed of by the Secretary of the Interior as provided in said act and held in trust for the benefit of such Indian.

These statutes clearly place the inherited interests received by the members of the Osage tribe of Indians in exactly the same status as in the share or allotment of such member. This matter was specifically dealt with in the case of *LaMotte* v. *United States*, 256 Fed. 5, paragraph three of the syllabus in said case reads as follows:

> "Under First Allotment Act, June 28, 1906, sections 2-7, 12, held that the Secretary of the Interior is required to approve a lease of lands allotted under the statute and held by minors or other incompetent Indians, whether such lands came to them by allotment, descent, or devise, and whether the lease was arranged by a parent, guardian, or administrator, who might or

might not be a non-member of the tribe, or an Indian certified as competent, or was approved by the state County Court."

This case was taken on appeal to the United States Supreme Court and is found in 254 U. S., page 570, 65 L. ed. 410, wherein the position taken by the Circuit Court of Appeals for the Eighth Circuit with reference to the status of the heirs was approved. The *LaMotte* case did not deal with the disposition of the tribal funds, but had to do with the control and jurisdiction of the Secretary of the Interior over the allotted lands, whether in the hands of the original allottee or an heir of such allottee.

It is claimed by the respondent that because this petitioner received a certificate of competency under the terms of the seventh paragraph of section 2 of the Act of June 28, 1906 (34 Stat. L. 539), that he is placed in a different position with reference to being liable for an income tax than what he would be if he had not received such certificate of competency. It will be noted, however, that all the granting of a certificate of competency does under said act is to authorize the allottee to sell, lease, or otherwise dispose of his surplus lands and does not in anywise change his status as a member of the Osage tribe of Indians.

This question was before the Supreme Court of the State of Oklahoma in the case of *Neilson* v. *Alberty*, 129 Pac. 847. In the opinion in said case, on page 851, it is said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United

States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Investment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the statute authorizing the issuance of certificates of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands, and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

It must be borne in mind that the mineral interests from which the greater part of the income involved herein comes are tribal property held in trust by the United States for the tribe; also, that the lands and moneys of this petitioner from which the remainder of the income herein comes are restricted property held in trust by the United States for him.

—*United States* v. *Ramsey*, 271 U. S. 467.

Supporting Reasons—*Number VIII.*

The Osage tribe of Indians being a distinct political entity and not being subject to the income tax laws of the

United States, all of its resources, whether physical property, income derived therefrom, or interests of any other kind, are the capital assets of said tribe, and the same may all be used by the United States whenever it sees fit and in whatever way it sees fit for the benefit of said tribe. Said income may be re-invested and re-employed by the United States for the interest of said tribe if it so sees fit without distributing any of it to the members of said tribe, or to their heirs, the only requirement being that Congress may exercise its power and authority in that regard by adopting a new act with reference thereto—hence, it must follow that, so far as the members of said tribe are concerned, when any part of the assets of the tribe comes to them upon distribution, it comes to them as a part of the capital assets of the tribe and not as income as defined by the income tax laws of the United States.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that your petitioner may have justice, and that a writ of *certiorari* should be granted, and this court should review the decision of the Circuit Court of Appeals for the Tenth Circuit and finally reverse the same.

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No. 81

In the Supreme Court of the United States

October Term, 1930.

HENRY CHOUTEAU, *Petitioner,*

vs.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth District.

BRIEF ON BEHALF OF THE PETITIONER.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 81

HENRY CHOUTEAU, *Petitioner,*

vs.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth District.

BRIEF on BEHALF of the PETITIONER.

Statement.

This case is in this court on writ of *certiorari* to the Circuit Court of Appeals of the United States for the Tenth Circuit in which it is sought to reverse the judgment and order of said court affirming the judgment by the United States Board of Tax Appeals rendered in favor of this respondent and against this petitioner by said Board on the 9th day of February, 1929 (R. 11), and involving income tax for the years 1918, 1919 and 1920. The matter was heard

by the Board of Tax Appeals on the petition of this petitioner for a redetermination by said Board of the deficiency claimed against him for said years, the answer of this respondent filed with said Board and an agreed statement of facts filed by the parties hereto. The petition for redetermination of the tax filed with the United States Board of Tax Appeals is found on pages 2, 3, 4, 5, 6 and 7 of the transcript of record, the answer of the Commissioner of Internal Revenue is found on pages 7 and 8 of the transcript of record. The agreed statement of facts is found on pages 9 and 10 of the transcript of record. The petition for review of the decision of the United States Board of Tax Appeals filed with the United States Circuit Court of Appeals is found on pages 13, 14 and 15 of the transcript of record. Judgment Circuit Court of Appeals (R. 33). Opinion Circuit Court of Appeals (R. 26) 38 Federal (2nd Series) 976, Certificate of Competency (R. 17).

Jurisdiction of this court is conferred by the judicial code, section 240-A, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this court adopted June 5, 1928, effective July 1st, 1928, and that the date of the judgment to be reviewed is February 5, 1930.

The facts relied upon by this petitioner as grounds for a reversal of the order of the United States Circuit Court of Appeals affirming the judgment of the Board of Tax Appeals are substantially as follows:

1. The petitioner is a member of the Osage tribe of Indians, duly allotted as such under the Act of Congress of

June 28, 1906 (34 Stat. L. 539), commonly known as the Osage Indian Allotment Act; that under said Act he was allotted his portion of the lands and monies belonging to the Osage tribe of Indians, but was not allotted his proportionate part of the minerals under said land belonging to the said Osage tribe, said minerals being reserved to the tribe for a period of twenty-five years from April 8, 1906. The income of the tribe derived from said minerals, after deducting the expenses incurred in conducting the affairs of the Osage tribe, was distributed among the members of the tribe and placed in the Treasury of the United States to the credit of such members.

2. The income of the petitioner, which is involved in this controversy is his part of the net income received by the Osage tribe, and which was paid out to him as provided by said Act of Congress, also income received by him as an heir of another member of the Osage tribe of Indians, such income being derived from the same source. There is no income involved in this action, except that derived from tribal sources.

3. This petitioner is and was at all times duly enrolled as a member of the Osage tribe of Indians, and sustained, and still sustains tribal relations with said tribe.

4. The income in the first instance being the income of the Osage tribe of Indians was not subject to the income tax law of the United States. Congress did not attempt to tax said income nor did it require a fiduciary return to be made by or for said tribe, showing the amount of income or its

distribution among share owners, as is provided for by fiducaries.

5. The funds belonging to the tribe and while belonging to the members of the tribe after distribution and before being paid out is a trust fund, and being a trust fund in the hands of the Government will not be taxed except by specific legislation therefor.

The United States Circuit Court of Appeals for the Tenth Circuit (38 Federal Reporter 2nd, page 976), passing upon this case, held that because this petitioner had a certificate of competency (R. 17) the income in question became subject to the Federal Income Tax laws. In a companion case (*Blackbird* v. *Commissioner of Internal Revenue,* 38 Federal 2nd, 976), the court held that because Mary Blackbird did not have a certificate of competency, her income received from the same source as the income of this petitioner, was not subject to the Federal Income Tax law. It will be our purpose in this brief to show to the court that not only was the Circuit Court of Appeals right in holding that the income of Mary Blackbird was not subject to the Federal Income Tax, but that the court erred in holding that the income of this petitioner was subject to Federal Income Tax laws, because he had a certificate of competency. It will be urged that the Circuit Court of Appeals erred in construing the effect of the certificate of competency as entirely relieving the petitioner from governmental restrictions or control and placing him in the same class as a citizen of the United States and a non-member of an Indian tribe.

ASSIGNMENTS *of* ERROR.

The errors complained of are as follows:

1. The Circuit Court of Appeals erred in holding that because this petitioner, who is a duly enrolled and allotted member of the Osage tribe of Indians, had a certificate of competency his proportionate part of the income of the tfibe was, when distributed to him, subject to an income tax.

2. The court erred in holding, in effect, that the petitioner is no longer a ward of the Govrenment.

3. The Circuit Court of Appeals erred in sustaining the United States Board of Tax Appeals in rendering judgment in favor of this respondent and against this petitioner.

PROPOSITIONS.

The petitioner presents this case to the court on the following propositions:

1. The Osage tribe of Indians is not included among those presons, firms, corporations, *et cetera* required to file an income tax return or a fiduciary return.
2. The status of the petitioner is that of a restricted member of the Osage tribe of Indians.

3. The income received by the Osage tribe of Indians is an income which Congress may not impose tax against under the Constitution of the United States.

4. Congress has not attempted to tax the income of the Osage tribe of Indians, either in the hands of the tribe or on distribution among the members thereof.

5. The income of the tribe not being subject to a tax, it cannot become subject to a tax on distribution.

6. The status of the income of an Osage Indian, heir of another Osage Indian, is the same as the income received by him as an allottee.

7. The funds received by members of the Osage tribe of Indians from tribal sources is in the nature of a gift and not an income.

ARGUMENT.

I.

The Osage tribe of Indians is not included among those persons, firms, corporations, *et al.*, required to file an income tax return, or a fiduciary return.

The list of persons, firms, corporations, *et al.*, who are required to make an income tax or fiduciary return does not, either directly or indirectly by inference or otherwise, include an Indian tribe. An Indian tribe is a different kind or character of entity from any of those sought to be taxed or whose shareholders or members are taxed. It does not include an Indian tribe by inference in the intention of Congress for the reason that it is foreign to and in conflict with the policy of the Government to attempt to impose a tax upon an Indian tribe, or the members thereof.

The Constitution of the United States regards Indian tribes as a distinct entity. It provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." (Section 8, Article 1.)

These tribes have been repeatedly held by various decisions of the Supreme Court to be a semi-dependent political body, with certain rights to govern themselves, and to control their internal affairs, unless the same is taken away from them by Acts of Congress or by treaty.

—*Cherokee Nation* v. *Georgia*, 5 Peters 1;
Worcester v. *Georgia*, 6 Peters 515;

United States v. *Kagama*, 118 U. S. 375;
United States v. *Rickert*, 188 U. S. 432;
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Elk v. *Wilkins*, 112 U. S. 95;
In re Sah-quah, 31 Fed. 329;
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United States v. *Nice*, 241 U. S. 591;
United States v. *Quiver*, 241 U. S. 602;
United States v. *Merriam*, 263 U. S. 179.

In *Cherokee Nation* v. *Georgia, supra,* Chief Justice MARSHALL referring to the clause in the constitution giving Congress power to regulate commerce with the Indian tribes, said:

> "In this clause they are as clearly contradistinguished by a name appropriate to themselves from foreign nations as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption."

In the case of *United States* v. *Lariviere, supra,* the court said:

"From the commencement of the Government, the United States has negotiated with the Indians in their tribal condition as nations; dependent, it is true, but still capable of making treaties, and this was only following the practice of Great Britain before the revolution. In *Worcester* v. *Georgia, supra,* the court said: The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having such definite and well understood meaning. We have applied them to the Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In *Re Sah-quah,* the court used the following language:

"From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their respective tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts, and the manner of their enforcement, marriage, descents, and the punishments for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints were from time to time deemed necessary for their own protection and that of the whites adjacent to them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16, 17; *Jackson* v. *Goodell,* 20 Johns. 193."

In *Worcester* v. *Georgia, supra,* which was a case involving the relations of the Cherokee Indians to the United

States and the right of the State of Georgia to control in any way the lands or individuals residing within the boundaries of the Cherokee Nation in the State of Georgia, the court, by Chief Justice MARSHALL, in the opinion, among other things, said:

"The third article acknowledges the Cherokees to be under the portection of the United States of America, and of no other power.

"This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

"The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependent

ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

"This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

"The same stipulation entered into with the United States, is undobtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledged themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. * * *

"The fourth article declares that 'the boundary between the United States and the Cherokee Nation shall be as follows: beginning,' etc. We hear no more of 'allotments' or of 'hunting-grounds.' A boundary is described, between nation and nation, by mutual consent. The national character of each; the ability of each to establish this boundary, is acknowledged by the other. * * *

"From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. * * *

"The treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. * * *

"The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self government—by associating with a stronger and taking its protection. * * *

"The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the Acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the Government of the United States."

Prior to the Louisiana Purchase the Osage tribe of Indians was under the jurisdiction of France, but by reason of that purchase they became subjects of the United States. On November 10, 1808, the United States entered into a

treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (Kappler's Laws and Treaties, Vol. 2, p. 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "*Art. 6.* And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations, respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to-wit: Beginning at Fort Clark, on the Missouri, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States, all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the River Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be laid off in such manner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty provides:

> "*Art. 10.* The United States receives the Great and Little Osage Nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer

their lands to any foreign power, or to citizens of the United States, or to inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Lousiana Purchase on the part of the Unted States to assume the position of guardian and protector of the Osage tribe.

On September 12, 1815, after the close of the War of 1812, the United States again entered into a treaty with the Osage tribe of Indians, for the purpose of re-establishing peace and friendship between the United States and the said tribe of Indians. (Kappler's Laws and Treaties, Vol. 2, p. 119.) The preamble to said treaty reads as follows:

"The parties being desirous of re-establishing peace and friendship between the United States and the said tribe or nations, and of being placed in all things, in every respect, on the same footing on which they stood before the war, have agreed to the following articles."

And article 3 reads as follows:

"*Art. 3.* The contracting parties, in the sincerity of mutual friendship recognize, re-establish, and confirm, all and every treaty, contract and agreement, heretofore concluded between the United States and the said Osage tribe or nations."

Again on September 25, 1818, a treaty was entered into between the Osage Nation and the United States, whereby the Osage Nation ceded certain lands to the United States, and the United States agreed upon certain boundary lines as being the boundary line between the land owned by the Osage tribe of Indians and the United States. (Kappler's Laws and Treaties, Vol. 2, p. 167.)

The Treaty of June 2, 1825 (Kappler's Laws and Treaties, Vol. 2, p. 217), contains the preamble:

> "In order to more effectually extend to said tribes that protection of the Government so much desired by them, it is agreed as follows."

Then follows a treaty consisting of fourteen articles. In the fourteenth article is found the language:

> "These articles shall take effect, and become obligatory upon the contracting parties, as soon as the same shall be ratified by the president by and with the advice and consent of the Senate of the United States."

On January 11, 1839 (Kappler's Laws and Treaties, Vol. 2, p. 525), the United States entered into a treaty with the Osage tribe of Indians, article 3 of which reads as follows:

> "This treaty shall be binding on both parties when ratified by the United States Senate."

On September 29, 1865 (Kappler's Laws and Treaties, Vol. 2, p. 878) another treaty was entered into between the United States and the Osage tribe of Indians, article 10 of which expressed the dependency of the Osages upon the United States, and reads as follows:

"*Art. 10.* The Osages acknowledge their dependency on the Government of the United States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians, and they further agree to use their best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

"*Art. 17.* Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the senate and approved by the president."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this Act Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and Acts of Congress mentioned above establish the trust relation be-

tween the United States and the Osage tribe of Indians, but the United States, as a further evidence of such relationship, received from the Cherokee Nation in trust for the Osage tribe a deed for the lands, from which it now receives its mineral rights and these same minerals are now held by the United States under such trust deed (R. 17). The same thereby became a federal agency, by which the United States has endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to said tribe and held in trust by the United States.

It is specifically stated in said deed:

"This indenture, made and entered into this fourteenth day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, *in trust for the use and benefit of the Osages and Kansas Indians,* of the second part, witnesseth, that * * * (Italics ours.)

"*Whereas,* by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of One Million, Ninety-nine Thousand, One Hundred and Thirty-seven and forty-one Hundredth Dollars ($1,099,137.41), in payment for said tract of land. * * *

"*Therefore,* by authority of an Act of the Nation

al Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three. * * *

"Said party of the first part, by the aforesaid principal chief, and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas river, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these presents bargain, sell, remise, release, relinquish and confirm unto the said party of the second part forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory embracing the following townships, and fractional townships north and east of the Indian meridian. * * *"

Further evidencing the intention of the Government to retain control over the mineral resources of the tribe it is provided in the Act of Congress of June 28, 1906 (34 Stat. L. 539-543), as follows:

"That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas and other minerals, covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, that the royalties to be paid to the Osage tribe under any mineral

lease so made shall be determined by the President of the United States; and *provided further*, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *provided, however*, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

This is the only form of alienation of these minerals possible under the law.

In the seventh paragraph of section two of said Act of Congress of June 28th, 1906, it is provided:

"That nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided."

II.

Status of the petitioner is that of a restricted member of the Osage Tribe of Indians.

The petitioner is a member of the Osage tribe of Indians duly enrolled as such under the Act of Congress of June 28, 1906. At the time of the passage of said Act, his status as an Indian was the same as every other member of the Osage tribe regardless of the quantum of blood—in fact no distinction was made between members of the tribe on the question of the quantum of blood until the Act of Congress of March 3, 1921, which will be hereinafter referred to.

There was a provision in the Act of Congress of June 28, 1906, for the granting of what is called a "certificate of comeptency" to members of the Osage tribe of Indians by the Secretary of Interior upon application of said Indians provided the Secretary of the Interior found the applicant fully competent and capable of transacting his or her own business and caring for his or her own affairs. Said provision is the seventh paragraph of section 2 of the Act of Congress of June 28, 1906 (34 Stat. L. 539) and reads as follows:

"That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; *provided*, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; *provided*, that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; and *provided further*, that nothing

herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: and *provided further*, that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It will be noted that the privilege granted by such certificate of competency was that the Indian was permitted to sell and convey any of the lands deeded him by reason of said Act except his homestead, and that was the extent of the difference between a member of the tribe who was granted a certificate of competency and one who was not—in all other matters, they were the same.

The question as to the effect of the granting of a certificate of competency was before the Supreme Court of Oklahoma in the case of *Neilson* v. *Alberty*, 36 Okl. 490, 129 Pac. 847. In passing upon the question of the effect of the granting of a certificate of competency, the court said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Investment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the

statute authorizing the issuance of certificate of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

And this construction has been followed by that court ever since.

The Act of April 18, 1912 (37 Stat. L. 86, section 3), gives the County Courts of Oklahoma jurisdiction in probate matters to appoint guardians and administer all estates of the allottees of said tribe without regard to the facts as to whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

Section three of said Act reads as follows:

"*Sec. 3.* That the property of deceased and of orphan minor, insane or other incompetent allottees of the Osage tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma, but a copy of all papers filed in the County Court shall be served on the Superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottees require, to appear in the County Court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the County Court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the County Court shall determine. Every bond of

the executor, administrator, guardian or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *provided*, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *provided further*, that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior."

It will be noticed that this act makes no distinction between these members of the tribe that have a certificate of competency and those that do not have the same. If the petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend and control a proceeding instituted by or against him in the County Court of Oklahoma? Prior to the passage of this act the state courts had no jurisdiction over an Osage Indian estate.

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided*, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Prior to this enactment, an Osage could not make a valid will nor can he now, without the approval of the Sec-

retary of the Interior, even though he has a certificate of competency.

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood. Congress in the exercise of its power could legislate the same way with reference to Indians of less than half blood.

Section 5 of this act is as follows:

> "No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *provided*, that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with the petitioner, he being an Osage In-

dian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

—*Ramsey* v. *United States*, 271 U. S. 468, 70 L. ed. 1039;

In re Dennison, 38 Fed. (2nd Series) 662.

The question of the status of members of the tribe has been before the Federal District Court and the Supreme Court of the United States. In the case of *LaMotte & LaMotte* v. *United States*, 254 U. S. 570, 65 L. ed. 410, and dealing with the status of members of the Osage tribe the Supreme Court used this language:

> "The Osages have not been fully emancipated but are still wards of the United States."

This quotation, of course, referred to members of the tribe having certificates of competency for, in that case, there was no contention that an Indian of the Osage tribe who did not have a certificate of competency was not fully and completely under the control and jurisdiction of the United States.

In the more recent case of the *United States* v. *John Ramsey and Wm. K. Hale*, 271 U. S. 468, 70 Law ed. 1039, the Supreme Court of the United States had before it the question of validity of an indictment against John Ramsey and Wm. K. Hale, both white men who were charged with the murder of Henry Roan, a full blood Osage Indian who had a certificate of comeptency. The murder was alleged to have been committed on an allotment belonging to another

member of the Osage tribe of Indians who did not have a certificate of competency. It was the contention of the counsel for Ramsey and Hale that the United States did not have jurisdiction of the case because, *first*, that the land where the homicide was committed was not Indian country and, *second*, because the United States no longer had jurisdiction of the offenses of this character committed in Osage County, Oklahoma. This involved the question not only of the status of the land but of the status of the members of the Osage tribe of Indians. The fact that Henry Roan had a certificate of competency was not given any consideration by the Supreme Court, but the case was considered from the standpoint of the federal statutes with reference to the offenses committed in Indian country, the court holding that the allotment in question was Indian country because it was still subject to supervision and control of the Secretary of the Interior; also, under the statute which makes it a violation of the federal law in a state to kill an Indian in Indian country within the limits of the state. The court held the indictment to be good and directed the trial of Ramsey and Hale in the federal courts. In discussing the question of the status of the Indians in the opinion, the court said:

> "But the authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before (*Donnelly* v. *United States*, 228 U. S. 243, 271, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913-E, 710), in virtue of the long settled rule that such Indians are wards of the Nation in respect of whom there is devolved upon the Federal

Government 'the duty of protection, and with it the power' (*United States* v. *Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109). The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the Nation (*United States* v. *Osage County*, 251 U. S. 128, 133, 64 L. ed. 184, 187, 40 Sup. Ct. Rep. 100; *United States* v. *Nice*, 241 U. S. 591, 598, 60 L. ed. 1192, 1195, 36 Sup. Ct. Rept. 696), and it rests with Congress alone to determine when that relationship shall cease (*Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rept. 506; *United States* v. *Celestine*, 215 U. S. 278, 290, 54 L. ed. 195, 199 30 Sup. Ct. Rep. 93)."

The District Court of the United States for the Western District of Oklahoma in *Quarles* v. *Dennison*, 38 Fed. (2nd Series) 662, in a bankruptcy case involving an Osage Indian with a certificate of competency, in paragraphs one and two of the syllabus states the status of the bankrupt as follows:

"A 'comeptent' Osage Indian is one having certificate of competency which gives him certain rights as to disposal of his property."

"Under Osage Allotment Act (Act June 28, 1906, 34 Stat. 539) and amendments thereto, Act of March 3, 1921, 41 Stat. 1249, and Act of March 2, 1929, 45 Stat. 1478, an Osage Indian of less than half blood with certificate of competency, or with restrictions removed, does not have right to dispose of his trust fund or his trust estate."

And, in the opinion in the case with reference to the status of the bankrupt, the court said:

"Counsel for the trustee insist in their brief that a member of the Osage tribe, of less than half blood, who has received a certificate of competency, has all the rights of a white man, and that he can dispose of any of his property. I cannot agree with the learned counsel, nor do I find any decisions which were cited in their brief to justify that contention. A member of the tribe receiving a certificate of competency could, prior to the Act of March 3d, 1921, dispose of any property which he had, including his surplus land, but could not dispose of his homestead during the trust period.

"Section 3 of the Act of March 3d, 1921 (41 Stat. 1249) gave to an Osage Indian of less than half Indian blood the additional right to dispose of his homestead, but no power was given in this act or any other act to dispose of or incumber in any way his interest in the trust estate."

A fair construction of the various Acts of Congress with reference to the Osage tribe of Indians will disclose that Congress has been very slow in relieving itself of its duties and obligations toward the tribe and its members or as has been said "slow in emancipating them." It has granted to certain members certificates of competency authorizing such members to do certain things without being controlled by the United States; it has declared all members of the tribe to be citizens of the United States, but has specifically reserved to the Government the control and management of the tribe's affairs; it has given to the County Courts of Oklahoma jurisdiction with reference to the estates of deceased members of the Osage tribe of Indians, and with reference to guardianships, with certain limita-

tions and restrictions. For instance, it has provided that copies of all papers must be served upon the Superintendent of the Osage tribe of Indians, and this has been held to be a condition precedent to the County Court obtaining jurisdiction over Osage estates or to act on the same.

In the case of *In re Guardianship of Winnett, Wright, Superintendent,* v. *Riber, et al.,* 112 Okl. 43, 239 Pac. 603, the Supreme Court of Oklahoma held that the Superintendent of the Osage Agency is a necessary party to the proceedings and is entitled to notice. In the opinion, the court says:

> "The superintendent is therefore a necessary party to the action so far as the notice of its pendency is concerned, and his plea to the jurisdiction of the court and to the hearing being had on the date the petition was filed was proper and timely."

In the case of *In re Pitts, Wright, Superintendent,* v. *Citizens Trust Company,* 115 Okl. 116, 242 Pac. 1036, the Supreme Court of Oklahoma held that it was necessary for copies of all papers in guardianship matters to be filed with the Superintendent of the Osage Agency as required by Act of Congress of April 18, 1912, before the court could acquire jurisdiction. In the opinion, the court says:

> "The first proposition presented by the appellant is that the Superintendent of the Osage Agency is a necessary party to every proceeding in the County Court respecting the property of a deceased or orphan minor, insane, or other incompetent allottees of the Osage tribe of Indians, and that, as it is admitted, no notice of the application of the Citizens Trust Com-

pany, guardian, was had upon the Superintendent of the Osage Agency, the County Court was deprived of jurisdiction to make the order complained of and the District Court of Osage County was without jurisdiction to approve the said order of the County Court."

It has also provided that guardians for members of the Osage tribe of Indians of one-half or more Indian blood, whether they had certificates of competency, or not, could not be appointed without the approval of the Secretary of the Interior. In section one of the Act of February 27, 1925 (43 Stat. 1008), is found this language:

> "No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage tribe of Indians who does not have a certificate of competency, *or who is of one-half or more Indian blood.*"

It is also provided in section one of said Act:

> "All payments to legal guardians of Osage Indians shall be expended subject to the joint approval in writing of the court and the Superintendent of the Osage Agency."

Prior to authorizing the County Courts of Osage County and Oklahoma, to assume jurisdiction in these matters, the courts had no jurisdiction over the affairs of the Osage tribe of Indians, and all the affairs of the Osage tribe of Indians were subject to disposal by the Secretary of the Interior whose duty it was, prior to authorizing the courts to settle estates, to determine the heirs and settle the estates of the deceased members of the tribe. This petitioner can not make a valid will with reference to his property

without the approval of the Secretary of the Interior under the Act of Congress of April 18, 1912, hereinbefore referred to. How it can be said that the status of this petitioner is that of a white man or that he is no longer a ward of the Government is beyond comprehension in view of the various Acts of Congress and the various decisions of the courts with reference thereto.

Under the Act of Congress of April 12, 1924 (43 Stat. L. 94) it is provided "that any right to, or interest in, the lands, monies, or mineral interests as provided in the Act of Congress approved June 28, 1906, entitled 'an act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes' and acts amendatory thereof or supplemental thereto, vested in, determined or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe." Congress here definitely provided a means for those of non-Indian blood, who inherited or received by will property of members of the Osage tribe of Indians to sell or dispose of the same subject to the approval of the Secretary of Interior and not otherwise. This Act of Congress further demonstrates the status of a member of the tribe having a certificate of competency with reference to his part in the tribal property. It is a well established principle of law that, where there is an Act of this kind authorizing certain classes to do certain things, it has the effect of preventing other classes not given this

privilege from doing the same thing and clearly demonstrates that no member of the tribe whether with or without a certificate of competency could in any wise sell or dispose of his interest in the tribal property.

III.

The income received by the Osage Tribe of Indians is income which Congress may not impose a tax against under the Constitution of the United States.

By these various treaties, the Osages without any adequate consideration other than the guaranty of the United States to protect the tribe, ceded vast tracts of land to the United States, comprising the greater part of the States of Missouri and Arkansas, a large part of Kansas, and a considerable portion of Oklahoma.

The United States will not violate its trust obligations to this tribe. Neither can it be disputed that the tribe is a distinct political entity, dependent, it is true, but of specific, different character from every other class.

Except from the general status of an Indian tribe, and the members thereof as disclosed by the decisions of this court, the early history of the Indians and their relations to the Government of the United States, there is little to be found bearing directly upon the question as to whether Congress could or could not impose a direct tax on them. Evidently, however, the framers of the constitution were of the opinion that Indian tribes and the members thereof would not be subject to taxation for it is provided in section 2, article 1 of the Constitution, that apportionment of repre-

sentatives and direct taxes shall be made among the states, "*excluding Indians not taxed.*" No other persons were excluded. Evidently the use of the term "excluding Indians not taxed" in connection with the term "direct taxes" implies the proposition that Indians were not to be taxed either by the state or by the federal government. Tribal Indians were "Indians not taxed." (*Elk* v. *Wilkins*, 112 U. S. 94, see also dissenting opinion.) The Sixteenth Amendment to the Constitution of the United States was adopted in order to get rid of the proposition of apportionment of taxes and did not extend the power of Congress to new subjects of taxation.

—*Peck* v. *Lowe*, 247 U. S. 165;
Stanton v. *Baltic Mining Co.*, 240 U. S. 103;
Eisner v. *Macomber*, 252 U. S. 189.

Congress has not attempted to tax the Osage Indians.

The exemption of the Indian from federal taxation also grows out of treaty relations between the United States and the Indians and the status of tribes and members thereof at the time of the adoption of the constitution and since. These treaties are the supreme law of the land. They supersede all prior acts of Congress. No repeal is inferred from general statutes. Ordinarily a repeal must be express and specific. Until this is done, the treaty remains the supreme law. Such repeals are never favored. A breach of good faith is not lightly imputed to Congress.

Such being the case, it is not to be presumed that Congress, by enacting a general tax law, *intended to repeal a*

treaty or to modify it in any particular. A conflict between a special treaty and a general law is to be avoided, if any reasonable interpretation will avoid it. In construing the language of Congress, it may properly be assumed that Congress did not intend a gross breach of faith.

These considerations have given rise to the settled rule that general statutes of Congress are not to be taken as applying to the Indian tribes unless it appears that the attention of Congress must have been particularly directed to the prior specific laws or treaties protecting the Indians.

—*Elk* v. *Wilkins*, 112 U. S. 94;
Washington v. *Miller*, 235 U. S. 422, 428;
Choate v. *Trapp*, 224 U. S. 665.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 94, has never been questioned:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General Acts of Congress did not apply to Indians, unless

so expressed as to clearly manifest an intention to include them."

In 14 R. C. L., page 125, paragraph 21, it is said:

"It has been determined that Congress cannot be supposed to grant Indian country by a law general in its terms; specific language, leaving no room for doubt as to the legislative will, is required for such a purpose."

And on page 116, 14 R. C. L., it is said:

"Because of the unequal situation of the contracting parties, the language used in treaties with Indians should never be construed to their prejudice."

Section 71, Title 25, U. S. Code (R. S. 2079), provides:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Under the Constitution of the United States and the general policy of the government in all of its dealings with Indian tribes, the same was done by treaty. The policy of the government was changed so that in place of treaties all matters relating to Indian tribes and Indians were cared for by Act of Congress. Manifestly it was not intended that any general Act of Congress which does not specifically refer to Indian tribes or Indians shall include them. This

section did not change the relation of the Indian tribes to the United States.

—*Elk* v. *Wilkins*, 112 U. S. 94.

At this point it might be well to call the attention of the court to the status of members of the Osage tribe of Indians. The petitioner is a member of the Osage tribe of Indians. He and his interest in tribal property are subject to the control of the United States. The Osage Indians still maintain their tribal organizations and tribal relations. That members of the tribe have not been released from the guardianship or control of the Unted States. *LaMotte* v. *United States*, 254 U. S. 570; *United States* v. *Ramsey*, 271 U. S. 467. Prior to March 3rd, 1921, members of said tribe were not citizens of the United States. In that act it is provided:

> "That all members of the Osage tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law."

The only way in which an Osage Indian could become a citizen of the United States and at the same time still maintain his tribal relations was by Act of Congress.

31 Corpus Juris, 432, in which it is said:

> "As a general rule an Indian is not a citizen of the United States by birth, because not born 'subject to the jurisdiction thereof,' but it has been held that an Indian born in the United States, of a tribe which has ceased to maintain its tribal integrity, and who is sub-

ject to the laws of the state in which he lives, is a citizen. An Indian cannot make himself a citizen without the consent and co-operation of the government. He may be naturalized, either individually or through collective naturalization effected by treaty or statute."

—*Elk* v. *Wilkins*, 112 U. S. 94, 28 L. ed. 643.

Vol. 14, R. C. L, page 117, in which it is said:

"An Indian is not, by virtue of his membership in a tribe residing within the limits of this country, a citizen of the United States, nor can he put off his alien and dependent condition at his own will, without the action or assent of the United States. But he may, like the subject of another foreign government, be naturalized by the authority of Congress, and become a citizen of a state and of the United States."

Vol. 14, R. C. L., page 118, in which it is said:

"The fourteenth amendment to the federal constitution provides that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' It has been definitely decided that this amendment does not operate to grant citizenship to the Indians, for the reason that Indians, born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes, although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the 14th amendment than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."

The question of Citizenship of an Indian and how he may become a citizen of the United States gives added explanation to the status of an Indian tribe and the members thereof. Citizenship does not change the status of an Indian (*United States* v. *Nice*, 241 U. S. 591, 60 Law ed. 1195; *United States* v. *Celestine*, 215 U. S. 278, 54 Law. ed. 199; *Winton* v. *Amos*, 255 U. S. 375.) The United States has reached out and put its protecting arm around the Indian tribes and the members thereof and has taken them and their property under its guardianship in consideration of the Indians ceding to the United States substantially all of their possessions in order that the United States might be able not only to advance them in civilization, but that it might build and maintain a great country. Under the treaties between the various Indian tribes and the United States, and the concessions and agreements made therein by the respective parties, the United States is now, and always will be as long as there is an Indian, *the debtor of the Indian tribes and their members.*

It is contended by the respondent that since the revenue acts under which this tax is sought to be collected provide that the entire net income received in the preceding calendar year from all sources by every individual, citizen, or resident of the United States is subject to an income tax that this language includes the individual members of the Osage tribe of Indians. This overlooks the well established rule of construction, as announced by the Supreme Court, that the general Acts of Congress do not apply to Indians,

unless so expressed as to clearly manifest an intention to include.

In *Choate* v. *Trapp*, 224 U. S. 665, the court said:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years and has been applied in tax cases.

"For example, in *Kansas Indians (Blue Jacket* v. *Johnson County)*, 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale of state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice DAVIS, in speaking for the court said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice MARSHALL, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning.' Again, in *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their

favor in determining the rights to the Choctaws and Chickasaws."

—*Elk* v. *Wilkins*, 112 U. S. 94;

14 R. C. L., page 125, paragraph 21.

"Every indiviual" is broad enough to include the officials and instrumentalities of the states, but the judiciary may well assume and does assume that Congress never intended to extend the statute to objects beyond its constitutional power, and, again, *if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.*

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject-matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punish all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *United States* v. *Kirby*, 7 Wallace 482, to exemplify the rule that:

"The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of The Holy Trinity* v. *United States*, 143 U. S. 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services of any kind in the United States."

The question arose whether the migration under contract to this country of a clergyman to serve as pastor of Holy Trinity Church of New York City, was a violation of this law. According to the literal signification of words, he was clearly within the provisions "to perform labor or services of any kind in the United States," and yet the Supreme Court held that the statute construed in the light of its manifest purposes did not apply to other than manual toilers, Mr. Justice BREWER said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and services both used, but also, as it were to guard against any narrow

interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and further, as noticed by the circuit judge in his opinion, the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intentions of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case."

A notable and more recent illustration of this principle was the case of *United States* v. *Delaware & Hudson Company*, (213 U. S. 366).

In that case the commodity clause of the Hepburn Law made it unlawful for a railroad to transport any commodity "manufactured, mined, or procured by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect, except such ar-

ticles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Literally the act, with its disjunctive provisions, provided that a railroad could not transport any commodity, which it had manufactured, mined or produced, even though at the time of transportation it had ceased to have any interest in it. The question was whether the act applied to coal, which had been mined by a railroad but sold by it before it had entered into transportation.

The Supreme Court, in an opinion by Chief Justice WHITE, disregarded the literal force of the sweeping language of the commodity clause in order to harmonize it with the general policy of this and other statutes, which regulate interstate commerce, and also to avoid the decision of a *grave constitutional question*, to which the literal interpretation would have given rise.

In Black on Interpretation of Laws, 116, the proposition is thus stated:

> "As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

So in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

But why elaborate the point? The books are full of cases where the literal meaning of statutory language is disregarded by reading into the statute exceptions, which the court knows as matter of common sense the legislature intended. Such a rule of interpretation, without which the administration of justice would lead to the most absurd and oppressive results, has its classic illustration in the interpretation of the constitution itself, for no language is more sweeping than the power given to the United States to tax, and such language, as in this case is strengthened by its own express exceptions. When, therefore, this clause first came to be expounded, it might have seemed plausible to argue that, as the constitution itself made its own exceptions, and otherwise seemingly gave an unlimited power to tax without reservation or qualification, no other exception could be made by implication.

The sound common sense and far-sighted vision of Chief Justice MARSHALL swept away this narrow reasoning in *McCullough* v. *Maryland*, and the instrumentalities of the states were made, by judicial construction, exceptions to

the federal power of taxation in order to bring that sweeping power into harmony with the whole purpose of the constitution. That was an implication similar to the contention in this case, which argues that the general language of a taxing statute shall not be construed to apply to a situation which is manifestly beyond the purview of the statute, and which, if applied literally, would conflict with the historic policy of the nation to preserve, and not to diminish, directly or indirectly, the property of the Indians, or violate its sacred obligations to the Indians.

In *Blackbird* v. *Commissioner of Internal Revenue*, 38 Federal Reporter (2nd Series) 976, (a companion case to this one) the Circuit Court of Appeals said:

> "The mineral reserves under the lands are held in trust by the United States for the tribes and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still recognized as dependents on Governmental care; and it seems unreasonable to hold that a general tax statute should be applied to them when they are not named nor intention is some way expressed that it applies to them."

In 34 Op. A. G. 439, the Attorney General in what is known as the *Quapaw* case said:

> "* * * inalienability and non-taxability should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to *impute* to Congress under the broad range of our Internal Revenue Acts, an intent to impose a tax for the benefit of the federal government on *income derived*

from the restricted property of these wards of the Nation." (Italics ours.)

In *Lewellyn* v. *Colonial Trust Co.*, 17 Federal (second) 36, the Circuit Court of Appeals, Third Circuit, dealing with right to tax the Osage Indians, said:

"*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens, *Gould* v. *Gould*, 243 U. S. 151; *United States* v. *Field*, 255 U. S. 257, any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.

"*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the Government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by Government on its ward will not be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the Government. In support of this, reference is made to the Quapaw Indians, 34 Opinions Attorney General, 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian;' and *Choate* v. *Trapp*, *supra*, where it is said: 'The construction, instead of being strict, is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with the *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 94,

where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute, but did not pass upon the question as to whether Indians came within the purview of the statute.

The United States Board of Tax Appeals bases its decision in this case largely upon the case of *Cherokee Tobacco* v. *United States*, 11 Wall. 616. The *Cherokee Tobacco* case arose under the Act of Congress of June 20, 1868 (15 Stat. at L. 167), which imposed a tax on the manufacture and sale of distilled spirits, fermented liquors, tobacco, snuff, *et cetera*. In that case, because the law provided that an excise tax should be paid on the manufacture and sale of tobacco, in every part of the territory embraced within the limits of the United States, it was held that this included Indian Territory, and that notwithstanding the treaty existing between the Cherokee Indians and the United States to the effect that products of the farms produced by members of the tribe and the manufactured products thereof should not be subject to taxation by the United States, that Act of Congress of 1868 superseded the treaty. However, *Choate* v. *Trapp*, *supra*, has in effect reversed the *Cherokee Tobacco* case.

The decision in the *Cherokee Tobacco* case was by a minority of the court, although a majority of the court sat

on the case. The Supreme Court of the United States disapproved, or rather declined to accept the *Cherokee Tobacco* case as authority in the case of *43 Gallons of Whiskey*, (108 U. S. 491). In that case the court said with reference to the *Cherokee Tobacco* case:

> "The case of *The Cherokee Tobacco Tax*, 11th Wallace 616 (78 U. S. 237), cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four."

Referring to the *Cherokee Tobacco* case, the Circuit Court of Appeals said in the *Blackbird* case:

> "Counsel for respondent rely on *The Cherokee Tobacco* case, 11 Wall. 616, 20 L. ed. 227; but the opinion in that case, as a precedent, seems to have been nullified by what is said in *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491, 2 S. Ct. 906, 27 L. ed. 803. The case of *Mary Blackbird* is therefore reversed."

The question arose, with reference to the Hopi Indians residing upon the Hopi Indian Reservation in Arizona, as to whether the income of said Indians derived by reason of the increase of sheep bought for them by the United States and held in trust on the unallotted lands of the said tribe, was subject to the payment of income tax. The matter was referred to the Attorney General of the United States, and, in an opinion on the question (35 Op. Atty. Gen. 107), the Attorney General said:

"These Indians are yet wards of the nation, in a condition of pupilage or dependency from which they have not been discharged. The legal title to the lands they occupy rest not in them, either individually or as a tribe, but in the United States. Appropriations are annually made for the protection, welfare, education, and civic advancement of these dependent people. By these means the government hopes to encourage industry among the Indians, induce them to maintain permanent homes and families and adopt other habits of civilized life, and eventually fit them to assume the responsibilities of citizenship. To tax them is so inconsistent with the purpose and object of the government in its dealings with these Indians, and the relation that it maintains toward them and their property, that it cannot be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress.

"In view of the foregoing, I am of the opinion that unallotted Indians maintaining their tribal connections and residing on reservations of land set apart by the Federal Government for the tribe of which they are members do not come within the purview of the Federal Revenue Acts, and that, therefore, the income of such Indians derived from the increase of sheep and cattle bought for them by the government, or from business conducted on the reservation by such Indians with other Indian wards of the government, or from any other source herein considered, is not subject to federal income tax."

The same view has been expressed by the Solicitor of the Bureau of Internal Revenue with reference to the Ponca Indians (S. M. 5632).

The case of the *Hopi Indians* is more nearly like the situation with reference to the Osage Indians. Apparently, the sheep bought by the government for the Hopi Indians were held in trust for them, and the Indians received the income therefrom. With reference to the Osage Indians, the oil and gas minerals are unallotted tribal property and are held in trust for them by the United States and the income therefrom received by the United States. After deducting the costs and expenses of the United States in looking after the Osage tribe of Indians, and after deducting the expense of the tribal government, the remainder is distributed among the members of the tribe. It is this money received on distribution that the respondent seeks to tax.

The opinions of the Attorney General of the United States in the *Quapaw* case, and the *Hopi* case, *supra*, were acquiesced in by the Treasury Department of the United States. If it is true that the Quapaw Indians are exempt from the Federal Income Tax on income received from their allotted lands, without there being any specific provision either in the treaties or in the law, other than there being no right in said Indians to alienate their lands; and, if it is true that the same is the law with reference to the Ponca Indians on their allotted lands held in trust for them, then it would seem that there is much greater reason to believe that the income of the Osage tribe of Indians could not possibly be included in any of the terms of any of the Federal Income Tax Laws, without regard as to whether Congress could impose the tax; and if it is true that the income of the Osage tribe of Indians, received for it by the United States,

and held in trust for the members thereof until distributed, is not subject to Federal Income Tax, then such income, when distributed among the members of the tribe, could not, by any course of reasoning, be held subject to the payment of income tax.

On May 19th, 1930, Congress passed a joint resolution, indicating the policy of the Government toward the Indians:

"(Public Resolution—No. 74—71st Congress) (S. J. Res. 163) Joint resolution to carry out certain obligations to certain enrolled Indians under tribal agreement.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that any person duly enrolled as a member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted from taxation, and from which land the restrictions have been removed, and who was required or permitted contrary to such stipulation to pay any illegal or unauthorized Federal tax on the rents, royalties, or other gains arising from such tax exempt lands during the period of such exemption and who would be entitled under the law and rulings of the Treasury Department in similar Indian cases to a refund of the taxes so illegally or erroneously collected but for the fact that he failed to file a claim for such refund within the time prescribed by law, shall be allowed one year after the approval of this Act within which to file such claim, and if otherwise entitled thereto he may recover such illegal taxes in the same manner and to the same extent as if such claims for re-

fund had been theretofore duly filed as required by law, *it not being the policy of the Government to invoke or plead a statute of limitations to escape the obligations of agreements solemnly entered into with its Indian wards: Provided, however,* that in the case of the death of any such person such illegal taxes paid by him or on his account may in like manner be claimed and recovered by the person or persons who would have received such money had it constituted a part of his estate at the time of his death.

"*Sec. 2.* That all Acts and parts of Acts in conflict herewith are modified for the purpose, and only for the purpose, of carrying into effect the provisions hereof.

Approved May 19, 1930." (Italics ours.)

IV.

The income of the tribe not being subject to a tax it cannot become subject to tax upon distribution to the members thereof.

If our position is correct, as hereinbefore set forth, that the income of the tribe is not subject to taxation, whether it be from want of power in Congress to provide for the taxing of the same or whether it be because Congress did not intend to tax the same, necessarily it would follow that this income when distributed among the members of the tribe is not subject to tax, because if it were taxed it would defeat the purpose of Congress in not attempting to tax it, or it would be taxing income which was immune from taxation at its source.

—*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

In the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, it is said:

> "But it may be argued that the *Pollock* case was decided, before the passage of the Sixteenth Amendment to the Constitution, authorizing the Income Tax Law. In *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, which was the first case after the adoption of the Sixteenth Amendment involving the constitutionality of the Income Tax Act, the Supreme Court decided that the amendment did not confer upon Congress any new taxing power but served only to remove the limitation with reference to apportionment. It thereby removed the obstacle pointed out in the *Pollock* case, but did not change the law that *where the source is not taxable neither is the income.*" (Italics ours.)

Since the argument heretofore set out in this brief applies in principle to this proposition, it is not thought necessary to dwell at length upon the same. The control of the United States over property as a guardian which it holds in trust for a tribe of Indians or the members thereof is the same in principle, so far as burdening the property with taxation is concerned, as property owned by the United States.

In 37 Cyc, page 865, it is said:

> "The United States has no authority to tax the property of the state, nor has the state power to extract revenue from the property of the Federal Government, and from the nature of the case, neither will lay taxes upon its own property."

All that has heretofore been said with reference to the non-taxability of the funds coming to the petitioner by reason of his allotment as a member of the Osage tribe of Indians applies equally to the funds received by him as an heir of a member of the Osage tribe of Indians, and to interest on trust funds and rents from lands held in trust.

—*United States* v. *Bean*, 253 Fed. 1;
Brader v. *James*, 246 U. S. 88, 62 L. ed. 591;
Tolley v. *Burgess*, 246 U. S. 104, 62 L. ed. 600.

Section six of the Act of Congress of June 28, 1906, authorized members of the tribe to make wills, subject to the approval of the Secretary of the Interior, and in such wills the individual allottee may dispose of his or her lands, monies and mineral interests as provided for in said Act of Congress.

Section five of said act provides that after the period of twenty-five years the lands, monies and mineral interests referred to in said section shall become the absolute property of the individual allottees or their heirs.

Section seven provides that the surface of the land is set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, for twenty-five years from January 1st, 1907, but that leases on said lands by the allottee, or heirs, are subject to the approval of the Secretary of the Interior.

By the Act of Congress of March 3rd, 1921, a distinction was made between members of the tribe and their heirs who do not have certificates of competency and those who do have certificates of competency, in that, where members

of the tribe have certificates of competency they shall continue to receive the full amount of their interest in the accumulated funds of the tribe quarterly, while, if they do not have certificates of competency, they may only receive $1,000.00 quarterly, the remainder of the accumulated funds belonging to such Indian, whether coming from his own allotment or as an heir of another Indian shall be disposed of by the Secretary of the Interior as provided in said act and held in trust for the benefit of such Indian. The status of an Indian with a certificate of competency was not changed.

The statutes clearly place the inherited interests received by members of the Osage tribe of Indians in exactly the same status as in the share or allotment of such member. The matter was specifically dealt with in the case of *LaMotte v. United States*, 256 Fed. 5. Paragraph three of the syllabus in said case reads as follows:

> "Under First Allotment Act, June 28, 1906, sections 2-7, 12, held that the Secretary of the Interior is required to approve a lease of lands allotted under the statute and held by minors or other incompetent Indians, whether such lands came to them by allotment, descent, or devise, and whether the lease was arranged by a parent, guardian, or administrator, who might or might not be a non-member of the tribe, or an Indian certified as competent, or was approved by the state County Court."

This case was taken on appeal to the United States Supreme Court and is found in 254 U. S., page 570, 65 L. ed. 410, wherein the position taken by the Circuit Court of Ap-

peals for the Eighth Circuit with reference to the status of the heirs was approved. The *LaMotte* case did not deal with the disposition of the tribal funds, but had to do with the control and jurisdiction of the Secretary of the Interior over the allotted lands, whether in the hands of the original allottee or an heir of such allottee.

V.

Funds received by members of the Osage Tribe of Indians from tribal sources is in the nature of a gift and not an income.

Prior to the Act of Congress of June 28, 1906, which allotted the lands and the funds of the Osage tribe of Indians, the members of the tribe had no individual interest in or to the tribal property further than to receive a distributive share of the income of said tribe. Whether the individual received a distributive share or not, it was subject to whatever Congress might see fit to do with reference to the same. Congress could provide for any number of distributions that it saw fit, or it could provide for the funds to accumulate for the benefit of the tribe, and not pay out anything at all to the members thereof. Said Act of Congress did not allot the minerals, but reserved them for the tribe. The nature of the title to said minerals was not in the least changed by Congress in alloting the lands to the members of the tribe.

Under the allotment act each member of the tribe received his distributive share, except in cases of minors, whose share was paid to their parents, until the Act of Congress of March 3, 1921, when a change was made so that a

member of the tribe with a certificate of competency received his proportionate part of the tribe's income and a member, who did not have a certificate of competency, received only $1000.00 per quarter, and the remainder of his proportionate part was set aside for him to be invested by the Secretary of the Interior for his benefit as provided in said act, and the income of minor members of the tribe, except a portion of which was to be paid to parents or legal guardian for their support, was also withheld and invested for the benefit of such minors.

The position of a member of the tribe toward the tribe is in no wise similar to the position of a stockholder or shareholder in any business enterprise. A shareholder or stockholder in a business enterprise has a vested interest to the extent of his stock, which cannot be taken away from him by law. The interest of a member of the tribe, as provided by various acts of Congress, in the tribal income may be taken away from him by Act of Congress and held exclusively as tribal property for the use and benefit of the tribe as a whole. To distribute this among the members of the tribe is purely a gift to them, and does not come within the definition as provided by law as to what is income. Under the statute in force at the time involved in this case, it was provided:

> "The net income of a taxable person shall include gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales, or dealings in property, whether real or personal, growing out of

the ownership of use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever."

It is also provided in the Act of September 8, 1916, that among the exemptions in taxation should be:

"The value of property acquired by gift, bequest, devise, or descent."

Taking into consideration the plenary power of Congress over Indian tribes and their property and the right to handle the affairs and business of the tribes as they see fit, it would seem to be a necessary conclusion that funds of the tribe distributed to the members thereof could only be a gift, and as a gift would not under the law be subject to the payment of income tax.

It is, therefore, respectfully submitted that the decition of the Circuit Court of Appeals for the Tenth Circuit should be reversed and the funds or income of this petitioner derived from the source from which it came be held to be non-taxable.

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No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY CHOTEAU, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the income of a member of the Osage Tribe of Indians, who has received a certificate of competency, is taxable under the provisions of the Revenue Act of 1918 when such income consists of the *pro rata* share of such Indian of the income of the Osage Tribe received during the years 1918, 1919, and 1920 from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under the Act of June 28, 1906, c. 3572, 34 Stat. 539.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, 1065, are as follows:

> SEC. 210. That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *.
>
> SEC. 211. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.
>
> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever. * * *

The relevant provisions of the Act of June 28, 1906, c. 3572, 34 Stat. 539, will be found in the Appendix, pp. 10–12.

STATEMENT

The facts were submitted to the Board of Tax Appeals on stipulation (R. 8) in substance as follows:

The petitioner, Henry Chouteau, is a member of the Osage Tribe of Indians, duly enrolled and allotted as such under the Act of Congress of June 28, 1906, c. 3572, 34 Stat. 539, and has a certificate of competency as provided for in this Act of Congress. This certificate was issued on March 5, 1910. (R. 8.) The petitioner during the years 1918, 1919, and 1920 was also the owner of one-half share or allotment which he had received by inheritance from another member of the Osage Tribe of Indians, who was duly enrolled and allotted as such. Petitioner during the years 1918, 1919, and 1920 was, therefore, the owner of one and one-half shares or allotments, representing his own share or allotment and the one-half share or allotment which he had received by way of inheritance. (R. 8.)

During the year 1918 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $3,940.00, and from the inherited one-half share or allotment that was owned by him the sum of $1,970.00. (R. 8.) During the year 1919 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $4,980.00, and from the inherited one-half share or allotment that was owned by him the sum of $2,490.00. (R. 9.) During the year 1920 petitioner received as income

from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $9,900.00, and from the inherited one-half share or allotment that was owned by him, the sum of $4,950.00. (R. 9.) The amounts received by the petitioner were paid to him through the Osage Indian Agency at Pawhuska, Oklahoma. (R. 9.)

All of the said income received by the petitioner during the years 1918, 1919, and 1920 was his *pro rata* part of the income of the Osage Tribe of Indians which was received during the said years from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under the Act of Congress of June 28, 1906. The oil and gas mineral leases were upon a part of the lands originally bought for the Osage Tribe of Indians by the United States with money belonging to said tribe and held in trust for said tribe by the United States, said lands having been purchased from the Cherokee Tribe of Indians and deeded to the United States, to be held in trust by it for the Osage Tribe of Indians. (R. 9.) These lands were purchased from the Cherokee Tribe of Indians with funds realized upon the sale of lands of the Osage Indians located in the State of Kansas. (R. 9.)

For the years 1918, 1919, and 1920, petitioner paid as income taxes $122.40, $57.55, and $551.21, respectively. (R. 8–9.) The Commissioner of Internal Revenue sent a deficiency letter finding deficiencies in income taxes against the petitioner for the years 1918, 1919, and 1920 in the respective

amounts of $40.64, $68.98, and $248.39. (R. 4–5.) Before the Board of Tax Appeals, the petitioner contended that all of the income received by him during the years 1918, 1919, and 1920 was exempt from tax and that, accordingly, he did not owe any deficiencies but was entitled to a refund of the amounts which he had theretofore paid. (R. 2–3.) The Board of Tax Appeals held that petitioner's income received during the years 1918, 1919, and 1920, was not exempt from tax and accordingly entered judgment for the respondent. (R. 10.) The Board's decision was affirmed by the Circuit Court of Appeals. (R. 32.)

ARGUMENT

The certificate of membership in the Osage Tribe of Indians, issued to the petitioner on March 5, 1910, under the provisions of the Act of June 28, 1906, *supra*, provided in effect that since petitioner had been found "fully competent and capable of transacting his own business and caring for his own individual affairs," he was thereby invested "with full power and authority to sell and convey any or all surplus lands deeded him * * * except the minerals therein," which were reserved for the use of the tribe for twenty-five years from April 8, 1906. (R. 16, 31.)

Except for minerals reserved to the tribe, and his homestead allotment (made inalienable and nontaxable for twenty-five years by Section 2, subsection Seventh, of the Act of June 28, 1906, *supra*; see *infra*, pp. 10–11), petitioner was fully competent to sell or

otherwise to deal with the lands or other interests owned by him. While petitioner had no legal title to the minerals in such lands, and received his *pro rata* share in royalties and bonuses from mineral leases under the provisions of the Act of June 28, 1906, *supra*, he nevertheless had the right to sell or otherwise to deal with his equitable or undivided interest in such minerals and in the mineral leases from which the bonuses and royalties were derived. It has been held that white persons inheriting shares or allotments from Indians have the right to convey such equitable or undivided interests. *Levindale Lead Co. v. Coleman*, 241 U. S. 432, 440; *Mixon* v. *Littleton*, 265 Fed. 603 (C. C. A. 8th). The right of the competent Indian to dispose of his property or interests does not differ from that of the white heir.

Under the foregoing circumstances, the Circuit Court of Appeals held that the petitioner was fully emancipated by the certificate of competency except as to his homestead. The certificate was obtained at his request with the Government's consent. Thereafter, the rents and royalties from his undivided interests were not paid to him as a dependent ward.

Sections 210 and 211 of the Revenue Act of 1918, *supra*, impose an income tax upon the net income of "every individual." Section 213(a) of the same Act provides that "income derived from any source whatever" shall be included in gross income. Congress undoubtedly had the power to tax petitioner's income (*Heiner* v. *Colonial Trust Co.*, 275 U. S. 232,

234–235), and the foregoing provisions of the Revenue Act of 1918 are clearly broad enough to include that income in the absence of some special rule of statutory construction to the contrary.

The rule that general Acts of Congress do not include Indians unless the intention to include them is clearly expressed would appear inapplicable where the Indian has been emancipated by a certificate of competency. The principle upon which the rule is based is explained in *Choate* v. *Trapp*, 224 U. S. 665, as follows (p. 675):

> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

See also *Elk* v. *Wilkins*, 112 U. S. 94.

But in the present case the petitioner is no longer a defenseless ward of the Government. With his emancipation, voluntarily sought, the reason for any distinction in his favor ceased. Legislation with general application thenceforth includes him.

In this connection the provisions of the Act of June 28, 1906, *supra*, are significant. Section 2, sub-

section Seventh, of that Act (p. 11, *infra*) provides in part:

> * * * upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, * * *

The homestead is exempt from taxation under the express wording of the statute. Other lands are expressly subjected to taxation. There are no other express provisions of the statute relating to taxation or exemption from taxation of property or interests of competent Indians.

It seems clear from the foregoing that had Congress intended to exempt the income of competent Indians from the operation of the income tax laws, such intention would have been expressed when those laws were enacted. No exemption should be inferred or implied when the basic reason for such an implication no longer exists.

Taxation of petitioner's income can have no economic effect upon the tribe or the rights of incompetent Indians. No tax on income is assessed to the tribe itself, and no liability of the tribe is asserted. The burden rests solely upon the individual recipient of the income. The tax does not apply until the income reaches the individual and the shares of incompetent Indians exempt from the tax are not in any way reduced by taxation of the competent Indians. *Gillespie* v. *Oklahoma*, 257 U. S. 501, relied

upon by the petitioner, relates to taxes by the States; as already set out, the power of the United States to tax the income is clear. *Heiner* v. *Colonial Trust Co.*, *supra*. It would seem that there is no reason to extend to the competent Indian exemptions and privileges now enjoyed by the dependent, restricted wards of the Government who have not received a certificate of competency. "Tax exemptions are never lightly to be inferred." *Heiner* v. *Colonial Trust Co.*, *supra*, at 235.

CONCLUSION

While the case is an important one, it is submitted that the basic reasoning and conclusion of the Circuit Court of Appeals is correct. There is no conflict of authority. It is respectfully submitted, therefore, that the petition should be denied.

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ERWIN N. GRISWOLD,
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MAY, 1930.

Act of June 28, 1906, c. 3572, 34 Stat. 539, 540, 541, 542, 543, 544:

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

* * * * *

Fourth. * * * Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

* * * * *

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation,

consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided*, That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: *And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred

and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

U. S. GOVERNMENT PRINTING OFFICE: 1930

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 815

HENRY CHOTEAU, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

Upon request of counsel for the petitioner further consideration has been given to that part of the argument in our brief in opposition commencing with the paragraph beginning at the bottom of page 5 and continuing to the end of said paragraph at the middle of page 6. It is the contention of petitioner's counsel that an Osage Indian having a certificate of competency has no right to sell or otherwise deal with his equitable or undivided interest in minerals or mineral lands held in trust for the members of the Tribe, and that in this respect Osage Indians of mixed or full blood are not on the same footing as white persons inheriting shares or allotments from Indians and

authorized to deal with such property under the Act of April 12, 1924 (c. 95, 43, Stat. 94). In this contention petitioner's counsel is supported by the decision of the District Court for the Western District of Oklahoma in *In re Denison*, 38 F. (2d) 662, decided March 1, 1930, and upon reconsideration of the question we feel that the statements contained in the paragraph of our brief above referred to are not tenable and should be disregarded.

We nevertheless submit that the petitioner, who was an Osage Indian holding a certificate of competency duly issued to him pursuant to Sec. 7 of the Act of June 28, 1906 (c. 3572, 34 Stat. 579), upon receipt of the income here involved from leases of mineral lands, had an unqualified right to control and dispose of such income, and that the Circuit Court of Appeals was correct in its decision in the instant case in holding the receipt of such income subject to Federal Income Taxes. Accordingly we submit that the petition should be denied.

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PEDRO CAPÓ-RODRÍGUEZ,
Attorney.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1930

HENRY CHOTEAU, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 81

HENRY CHOTEAU, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 8–10) is reported in 14 B. T. A. 1254. The opinion of the Circuit Court of Appeals (R. 26–33) is reported in 38 F. (2d) 976.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 33) was entered on February 10, 1930. Petition for certiorari was docketed in this Court on April 14, 1930, and was granted May 19, 1930. (R. 35.)

QUESTION PRESENTED

Whether the income of a member of the Osage Tribe of Indians, who has received a certificate of competency, is taxable under the provisions of the Revenue Act of 1918, when such income consists of the *pro rata* share, consisting in part of his share as a member and in part of an inherited interest, of such Indian of the income of the Osage Tribe received during the years 1918, 1919, and 1920 from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under the Act of June 28, 1906 (c. 3572, 34 Stat. 539).

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, 1065, are as follows:

> SEC. 210. That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *.
>
> SEC. 211. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.
>
> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever. * * *.

The relevant provisions of the Act of June 28, 1906, c. 3572, 34 Stat. 539, which was the original allotment Act; the Act of April 18, 1912, c. 83, 37 Stat. 86, which amended the allotment Act in some respects and authorized the distribution of a portion of the tribal trust funds; the Act of March 3, 1921, c. 120, 41 Stat. 1249, which extended the period of reservation of the mineral rights in the lands previously allotted, and made certain other amendments to the previous Acts; the Act of February 27, 1925, c. 359, 43 Stat. 1008, amendatory of the prior Acts; and the Act of March 2, 1929, c. 493, 45 Stat. 1478, which also amended and amplified the preceding Acts and again extended the period of reservation of mineral rights, will be found in Appendices B, C, D, E, and F, pp. 31–53.

STATEMENT

The facts stipulated by the parties and found by the Board of Tax Appeals are, in substance, as follows (R. 9–10):

During the years 1918, 1919, and 1920 the petitioner was duly enrolled as a member of the Osage Tribe of Indians, under the Act of Congress of June 28, 1906, c. 3572, 34 Stat. 539, *infra*, p. 31. He held a certificate of competency as provided for in that Act, issued on March 5, 1910. He was the owner of one share or allotment as a member and of a half share as heir of a deceased member.

During the years in question he received certain income from his own share and from the inherited half share, which was paid to him through the Osage Indian Agency at Pawhuska, Oklahoma.

All of the income received by petitioner during the years in question was his *pro rata* part of the income of the Osage Tribe of Indians which was received during those years from oil and gas mineral leases made by the tribe with the approval of the Secretary of the Interior under the Act of Congress of June 28, 1906. The oil and gas mineral leases were upon a part of the lands originally bought for the Osage Tribe of Indians by the United States with money belonging to the tribe and held in trust for it by the United States, the lands having been purchased from the Cherokee Tribe of Indians and deeded to the United States, to be held in trust by it for the Osage Tribe of Indians.

For the years 1918, 1919, and 1920, petitioner paid as income taxes $122.40, $57.55, and $551.21, respectively. The Commissioner of Internal Revenue sent a deficiency letter finding deficiencies in income taxes against the petitioner for those years in the respective amounts of $40.64, $68.98, and $248.39. (R. 4–5.) Before the Board of Tax Appeals the petitioner contended that all of the income received by him during the years in question was exempt from tax and that, accordingly,

he owed no deficiencies but was entitled to a refund of the amounts which he had theretofore paid. (R. 2-3.) The Board held that petitioner's income received during those years was not exempt from tax and accordingly entered judgment for the respondent (R. 11), which was affirmed by the Circuit Court of Appeals (R. 33).

SUMMARY OF ARGUMENT

There is no express exemption covering either the income here sought to be taxed or extending an exempt status to the petitioner as to such income. Sections 210 and 211 (a) of the Revenue Act of 1918 subject the income of "every individual" to the tax, and under Section 213 (a) income "from any source whatever" is included. It was the intention of Congress to extend the income tax to all species of income, and in the absence of an express exemption the freedom of the income in question from taxation must rest upon an implied exemption arising either from the status of the petitioner or the nature of the income itself.

1. The petitioner was not exempt because as to the income sought to be taxed he was no longer a ward of the Government. The policy of the Government toward the Indian has been one of gradual emancipation to prepare him for complete independence by educating him in self-control and committing to him gradually the care of his property, and as a part of such education to impose upon him the duties and responsibilities as well as the

privileges of a property owner, including the duty to pay taxes. It would be inconsistent with this policy of educating the Indian in responsibility to hold him immune from taxation on property as to which he had been emancipated. The Act of June 28, 1906, c. 3572, 34 Stat. 539 (Appendix B, pp. 31–37), was passed pursuant to this policy of gradual emancipation. Under that Act petitioner's share of royalties received from oil leases on tribal lands was distributed quarterly to him with no restrictions upon the use of the money so distributed. No control over the distributed funds was reserved by the Government. The Act was a legislative judgment that so far as the distributed royalties were concerned petitioner was relieved of such guardianship, was fully emancipated, and was not entitled to exemption as a ward of the Government. The declaration of the Secretary of the Interior that he was fully competent and capable of managing his own affairs strengthens this view.

2. The only ground upon which an implied exemption of the income can rest is that either the income itself or the source from which it was derived constituted an instrumentality of the United States used in fulfilling its duty to the Indian. Such money upon distribution to petitioner ceased to be a Federal instrumentality, was no longer in the hands of the Federal Government, the Government had no further control over it, and the rea-

son for the rule of exemption of instrumentalities no longer existed. This Court has rejected the contention that income from leases of mineral rights held in trust for the tribe was exempt because of the exempt status of its source, and held that income from such source was subject to Federal taxation even though there might be some economic effect upon the Indians themselves. In this case still less reason existed for the implied exemption. The imposition of the tax here involved could have no economic effect on any other Indian nor hinder the Federal Government in any way in its use of the instrumentality from which the income was derived.

What Government instrumentalities will be held to be exempt depends upon the purpose and character of the legislation creating them. Petitioner was fully emancipated so far as this income was concerned, and immediately upon the distribution of the money it ceased to be an instrumentality of the Federal Government. Thereafter it was "education through the responsibility for spending" which constituted the instrumentality employed by the Government in fitting petitioner to take his full part as a citizen of the United States. To hold the income immune from taxation would be inconsistent with the very purpose of Congress in making the distribution.

3. The Treasury Department has consistently and for years asserted the income-tax liability of

Osage Indians as to income received from oil royalties, and it is reasonable to suppose that if this consistent administrative interpretation was contrary to the intention of Congress this practice of the Department would have been specifically corrected in some of the later revisions of the income tax laws.

ARGUMENT

PRELIMINARY STATEMENT

At all times involved in this case petitioner, an Osage Indian, was enrolled as a member of the tribe. He held a certificate of competency issued March 5, 1910, as provided for in Section 2 of the Act of 1906, p. 32, *infra*. During the years 1918, 1919, and 1920, petitioner received as a member his prc rata share, and as heir of a deceased member a half share, of the income from leases on the oil, gas, and other minerals reserved to the tribe under the Act, which were paid to him under Section 4, Second, thereof. (R. 9–10.)

It is this income which the Government is seeking to tax. Petitioner's right to receive the income arose thus: The Tribe originally owned lands in the State of Kansas. The Kansas lands were sold and other lands purchased for the Indians in what is now the State of Oklahoma, which were allotted in 1906 to the individual members of the tribe, with certain exceptions not material here. The tribe also owned a fund, derived from the sale of lands, etc., which was held in trust by the United States and

the interest from which was paid to the members of the tribe. Under Section 2, Seventh, and Section 3 of the Act of 1906, the oil, gas, coal, and other minerals were not allotted, but were reserved to the use of the tribe for a period of 25 years, at the end of which time such mineral rights were to go to the individual owners of the surface rights unless otherwise provided by Congress. This twenty-five year period was subsequently extended by the Act of 1921 and again by the Act of 1929. Under Section 3 of the Act of 1906 mineral leases were to be made by the tribe through its tribal council with the approval of the Secretary of the Interior and under such rules and regulations as he might prescribe. The President of the United States fixed the royalties to be paid. Under Section 4 the royalties received by the Indians from these mineral leases were placed in the Treasury of the United States, to the credit of the individual enrolled members of the tribe, and distributed to them in quarterly payments without restriction as to amount or as to use.[1]

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[1] This Court has frequently had occasion to consider questions concerning the Osage Indians. See *Thomas* v. *Gay*, 169 U. S. 264; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432; *McCurdy* v. *United States*, 246 U. S. 263; *United States* v. *Osage County*, 251 U. S. 128; *La Motte* v. *United States*, 254 U. S. 570; *Work* v. *Mosier*, 261 U. S. 352; *Work* v. *Lynn*, 266 U. S. 161; *United States* v. *Ramsey*, 271 U. S. 467.

During the taxable years involved the Revenue Act of 1918, c. 18, 40 Stat. 1057, was in effect. There is nothing in that Act or in any other Act of Congress exempting the income from the royalties here sought to be taxed or extending an exempt status to Indians. The language of the Revenue Act of 1918 is all-inclusive. Under Sections 210 and 211 (a) the net income of "every individual" is subject to tax and under Section 213 (a) income from any source whatever is included. It was the intention of Congress to extend the income tax not only to all species of income, but to all individuals unless expressly exempted. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Irwin* v. *Gavit*, 268 U. S. 161; *Willcuts* v. *Bunn*, No. 22, October Term, 1930, decided January 5, 1931. In the absence of an express exemption of either the income or the individual, therefore, petitioner's freedom from taxation must rest upon an implied exemption arising either from his status as an Indian or from the nature of the income itself. Such exemptions are never lightly to be inferred. See *Heiner* v. *Colonial Trust Co.*, *supra*, and cases cited therein.

I

AS TO THE INCOME HERE SOUGHT TO BE TAXED PETITIONER IS NOT EXEMPT BECAUSE OF HIS STATUS AS AN INDIAN

There can be no question that the royalties from mining leases received by petitioner constitute in-

come.[2] The only question is whether or not such income is exempt from taxation.

As to the income here sought to be taxed, the petitioner was fully emancipated, as will be shown, and hence is outside the class of unemancipated Indians dealt with in opinions of the Attorney General holding their income not subject to tax.[3]

Speaking generally, the policy of the Government toward the Indian has been one of gradual emancipation from the status of ward. It has sought to prepare him for complete independence by educating him in self-control and committing to him gradually the care of his property. As a part of such education there have been imposed upon him the duties and responsibilities as well as the privileges of a property owner, including the duty to pay taxes. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 437; *United States* v. *Nice*, 241 U. S. 591, 598; *United States* v. *Waller*, 243 U. S. 452, 459; *McCurdy* v. *United States*, 246 U. S. 263, 269; *La Motte* v. *United States*, 254 U. S. 570, 575; *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 579. In the case last cited

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[2] That the payments are not a gift from the Government as contended by petitioner (Br. 57–59) is plain. While Congress might withhold or distribute the tribal funds and property as it thought best in the exercise of its duty to the Indians, nevertheless the petitioner had an equitable interest therein and upon the distribution thereof he received not a gratuity but a share of that which was his own. *Choate* v. *Trapp*, 224 U. S. 665; *Quick Bear* v. *Leupp*, 210 U. S. 50.

[3] Op. Atty. Gen. 275; 34 Op. Atty. Gen. 302; 34 Op. Atty. Gen. 439; 35 Op. Atty. Gen. 1; 35 Op. Atty. Gen. 107.

this Court pointed out that it would be inconsistent with the policy of educating Indians in responsibility to hold them immune from taxation on property as to which they have been emancipated. As a general rule noncompetent Indians are restricted not only in the control over lands allotted to them but also in the use and control of moneys received by them. See Appendix G, pp. 54–62.

The preparation of the Osage Indians for their emancipation has continued through more than a century. Since the year 1825 various treaties and Acts of Congress have provided for schools, artisans, livestock, agricultural implements, etc. The Act of 1906 contained the first provision for definite partial emancipation. A narrative statement of its provisions and of those of subsequent Acts appears in Appendix A, pp. 25–31.

While under the Act of 1906 the homestead allotments of all members were inalienable and nontaxable for a stated period, and the surplus lands of those not holding certificates of competency were inalienable for 25 years and nontaxable for three years, the surplus lands of those holding certificates of competency became immediately alienable and immediately taxable, and all members, whether holding certificates of competency or not (except minors in certain cases), were credited with and paid quarterly their *pro rata* shares of all royalties received from mineral leases on tribal lands without any restriction whatever upon the control

and use of the moneys so received. The unrestricted character of the payments is confirmed by Section 4 of the Act of 1925, p. 48, *infra*, which, while authorizing the Secretary of the Interior to revoke a certificate of competency issued to a member of more than one-half Indian blood who is squandering or misusing his funds, provides that all of the Indian's just indebtedness existing at the time of revocation shall be recognized and paid out of his income. Further proof of the unrestricted character of royalty payments here involved is found in Section 4 of the Act of 1921, p. 42, *infra*, which provides that while members holding certificates of competency shall receive their *pro rata* shares of royalties other members shall be paid not more than $1,000 per quarter. See *La Motte* v. *United States*, 254 U. S. 570, 580.

Petitioner was as fully emancipated with respect to the quarterly payments as he was, by virtue of his certificate of competency, with respect to the use and sale of his surplus lands. In this situation we believe that the principle of *United States* v. *Waller, supra*, applies. There the United States brought a suit on behalf of two Chippewa Indian allottees of mixed blood to cancel and annul a deed alleged to have been procured from them by fraud. Under the Clapp amendment to the Allotment Act affecting these Indians the restrictions as to the alienation of allotments held by mixed-blood Indians had been removed. This Court held that the

Indians had thereby been fully emancipated as to the allotments in question and that the United States could not maintain a suit as their guardian. The Court said (p. 459):

> The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.

And again (pp. 462–463):

> The act thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands. This may be a mistake of judgment as to some cases, and if the allegations of the bill set forth in the certificate in this case are true, it is quite evident that the Indians here involved were incapable of making an intelligent disposition of their lands. But Congress

> dealt with general conditions, and with these classes of Indians as a whole, and with authority over the subject has given to adult mixed-blood Indians the full right to dispose of the lands in question. It is not for the courts to question this legislative judgment. * * * In the case now before us, in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. As to them the Government has no further interest in or control over the lands.

The doctrine of partial emancipation applied in the *Waller* case rested upon a statute removing restrictions as to alienation. We contend that the statute authorizing the distribution of this pro rata share of the royalties to the petitioner and giving him unrestricted control over the moneys so received evidences the intent of Congress to emancipate him and disposes of the contention that as to this particular income the petitioner stood in the relation of wardship to the United States.

This principle of partial emancipation has been recognized by this Court in other cases dealing with like quarterly payments to Osage Indians. In *Work* v. *Mosier, supra*, the Secretary of the Interior undertook to limit the amount to be paid

under Section 4 of the Act of 1906 to parental guardians of minor Osage Indians and to exercise control over the expenditure thereof. It was held (pp. 359–361) that no control could be exercised other than that prescribed in the Act of withholding payments in the case of misuse or squandering. After the payments were made they were beyond the control of the Government. In *Work* v. *Lynn*, *supra*, the Secretary of the Interior asserted the right to supervise the expenditure of the $1,000 paid quarterly under the Act of 1921 to the guardian of an Osage Indian. It was held that after payment to the guardian the Government had no further control over the funds (p. 169). Cf. *Goudy* v. *Meath*, 203 U. S. 146; *McCurdy* v. *United States*, *supra*; *La Motte* v. *United States*, *supra*; *United States* v. *Ransom*, 263 U. S. 691.

The doctrine of partial emancipation finds its counterpart in the principle applied in determining what governmental instrumentalities are immune from State taxation. In *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 578, this Court said:

> What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, can not be determined apart from the purpose and character of the legislation creating them.

We believe the principle of that case is that property acquired under a statute designed to educate the Indians in responsibility and independence is

not exempt from taxation unless Congress so declares. The statutes under which petitioner acquired the income in this case evidenced the purpose to free the Indians *pro tanto* from the control of the Government, and it would be wholly inconsistent to hold them immune from a tax applicable to the net income of "every individual."

An additional factor, not present in the cases cited, serves to make clear the intent of Congress to emancipate petitioner as to the income in question—the certificate of competency. The Act of 1906 (p. 32, *infra*) provides that the Secretary of the Interior may, upon request and petition of an adult Indian, if after investigation, consideration, and examination he finds the petitioner "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs," issue a certificate of competency, which was irrevocable until Section 4 of the Act of 1925 (p. 48, *infra*) authorized the revocation for cause of a certificate held by one of more than one-half Indian blood. It is true that the specific authority carried by the certificate is to convey lands other than homestead; but the qualification of the Indian is an indispensable prerequisite, and the certificate in terms declares him to be "fully competent and capable of managing and caring for his individual affairs" (R. 17)—the considered judgment of a responsible officer of the Government, not imposed upon the Indian, but asked for

by him. It would be difficult to produce stronger proof of the fact that the Indian no longer stands in need of the guardianship of the Government, or proof of the intent of Congress to invest him with the individual responsibility of a citizen in all respects so far as the income here involved is concerned.

II

THE INCOME WAS NOT EXEMPT

The only ground upon which an implied exemption of the income as such can rest is that either the income itself or the source from which it was derived constituted an instrumentality of the United States in fulfilling its duty to the Indian. Admittedly the reserved mineral rights and the proceeds derived from the mineral leases, so long as they remain in the hands of the Federal Government in trust for the tribe and undistributed to the individual Indians, are not taxed by the various Revenue Acts. The question on this phase of the case narrows down to whether the exempt status of the source follows the income upon its distribution to the individual Indian. It is the contention of the Government that such money upon distribution ceased to be a Federal instrumentality, was no longer in the hands or under the control of the Government, and that the reason for the rule of exemption of income from such instrumentalities no longer existed.

The general principle that income which is derived from an exempt source is also exempt, recognized in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, has been applied with some strictness where the question of State taxation was involved. *Gillespie* v. *Oklahoma*, 257 U. S. 501; *United States* v. *Rickert*, 188 U. S. 432; *Shaw* v. *Oil Corp'n, supra.* But while a Federal instrumentality used for the benefit of the Indian is not subject to State taxation in the absence of express consent by Congress, it is nevertheless subject to Federal taxation unless the intent to exclude it is specifically expressed, provided the language of the taxing Act is broad enough to include the subject of the tax, as is the case here. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234–235; *Shaw* v. *Oil Corp'n, supra*, p. 579. The language of Sections 210, 211 (a) and 213 (a), Revenue Act of 1918, as already pointed out, is sufficiently comprehensive to include not only the petitioner as an emancipated Indian, but also the income distributed to him which is here sought to be taxed.

The cases of *Gillespie* v. *Oklahoma* and *Heiner* v. *Colonial Trust Co.* are parallel except that in the former it was the State of Oklahoma and in the latter the Federal Government that sought to tax the income of a non-Indian derived from an oil lease upon Osage Indian lands. In the *Gillespie* case this Court held that the State might not tax the income because it was derived from a source

which was exempt as a Federal instrumentality used in the discharge of a fiduciary duty to the Indians. (P. 506.) This argument was urged in the *Colonial Trust Company* case but the Court held that in the face of the comprehensive language of the revenue laws the income was subject to Federal taxation even though there might be some economic effect upon the Indians themselves (pp. 234–235).

In the *Colonial Trust Company* case the fact that the source of the income was a Federal instrumentality did not exempt that income from the Federal tax even though it was admitted that such tax would have a perceptible economic effect on the Indians. In this case still less reason exists for the implied exemption claimed by petitioner. In no way could the imposition of the tax here involved have any economic effect on any other Indian either as an individual or as a member of the Tribe, or hinder in any way the Federal Government in its use of the instrumentality from which the income was derived. Petitioner as an individual is the only one affected. The fact that individual emancipated Indians may ultimately have to pay a tax upon royalties distributed to them can in no way affect the amount of royalties to be paid by lessees. The reason for the exemption of Federal instrumentalities or the income derived therefrom was only remotely present in the *Colonial Trust Company* case, and this Court refused to ap-

ply the rule. In this case the reason for the rule is entirely absent.

Even in the case of State taxation, the exemption of Government instrumentalities depends upon the purpose and character of the legislation creating them. *Shaw* v. *Oil Corp'n, supra,* p. 578. Petitioner was fully emancipated from his status as a ward of the Government so far as the income here involved was concerned, and the money ceased to be an instrumentality of the Federal Government immediately upon its distribution. This Court held in *McCurdy* v. *United States, supra,* that land purchased for a noncompetent Osage Indian out of the principal of trust funds held for him under the Act of 1906, as modified by Section 5 of the Act of 1912, was not exempt as a governmental instrumentality. The Court said (p. 272):

> It is education through the responsibility for spending, not the property purchased with released moneys, which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States.

This principle applies with equal force to this case. From the moment of the distribution it was not the money, or its source, but "education through the responsibility for spending" which constituted the instrumentality. To hold the income immune from taxation would be inconsistent

with the very purpose of Congress in making the distribution to petitioner, which was to educate him in responsibility. *Shaw* v. *Oil Corp'n, supra,* pp. 580–581.

In this case the source of the income was the same as in the *Colonial Trust Company* case. There the Court held that the income was not exempt. It is submitted that the principle there applied excludes from this case the source of the income as a basis of exemption.

III

THE TAXABILITY OF THE INCOME IN QUESTION IS IN ACCORD WITH ADMINISTRATIVE INTERPRETATION

The Treasury Department has consistently and for years asserted the income tax liability of Osage Indians as to income received from oil royalties. In connection with this case it has advised that during the years 1917 to 1928, inclusive, the quarterly payments to all Osage Indians on account of oil royalties has amounted to more than $255,000,000; that the depletion properly applicable thereto would amount to approximately $77,000,000; and that the income tax upon such distributed moneys would aggregate more than $6,000,000. The Treasury Department also advises that such income taxes have either been collected from individual Osage Indians for the years since 1916 or collection proceedings have been suspended pending the outcome

of this case, and that at all times the Treasury Department has actively asserted the liability of petitioner and others similarly situated. See Office Decision, Income Tax Unit, No. 1834, published in Internal Revenue Cumulative Bulletin II–2, July–December, 1923, p. 62 (Appendix H, pp. 63–71). The right of the Commissioner of Internal Revenue to collect such tax was sustained by the Board of Tax Appeals. See *Appeal of Leah Brunt, Administratrix, Estate of Theodore S. Brunt*, 5 B. T. A. 134. The petitioner here originally included a portion of these quarterly payments in his return and paid the tax thereon. (R. 9–10.)

As stated by this Court in *Heiner* v. *Colonial Trust Co., supra*, p. 235, if this consistent administrative interpretation "was contrary to the intention of Congress it is reasonable to suppose that this practice of the Department would have been specifically corrected in some of the revisions of the laws taxing income" in the later years.

CONCLUSION

Neither the petitioner nor his income was exempt from the income tax. The decision of the court below should be affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX A

RÉSUMÉ AND DISCUSSION OF TREATIES AND ACTS OF CONGRESS DEALING WITH THE OSAGE TRIBE OF INDIANS

There are numerous treaties and Acts of Congress dealing with the Osages. The first was the treaty concluded November 10, 1808, and ratified April 28, 1810 (Public Stat. L., Vol. VII, p. 107). Beginning with the Treaty of June 2, 1825, proclaimed December 30, 1825 (Public Stat. L., Vol. VII, p. 240), provision has been made for the furnishing of schools, artisans, livestock, farming utensils, etc. Like provisions occur in subsequent treaties. By the Treaty of September 29, 1865, proclaimed January 21, 1867 (14 Stat. 687), the Osages sold to the United States approximately 1,000,000 acres of land for which $300,000 was paid and held in trust for the Tribe. Other lands were ceded to the United States, to be held in trust and sold for the benefit of the Tribe. By the Act of July 15, 1870 (c. 296, 16 Stat. 335), provision was made for the removal of the Tribe from Kansas to the Indian Territory. The Act of March 3, 1873 (c. 228, 17 Stat. 630, 638), made available from tribal funds $1,650,600 to pay the Cherokee Indians for lands in Oklahoma for an Osage reservation. Various Acts made provision for per capita payments and for distribution of interest on the tribal funds.

The Acts of 1906 and 1912, *infra*, were passed pursuant to the policy of gradual emancipation evidenced by the earlier Treaties and Acts. The later Acts of 1921, 1925, and 1929, *infra*, are in part included in this appendix for reference.

The Act of 1906 made provision for the allotment to the individual Indians of all of the tribal lands, with unimportant exceptions. Three allotments were made to each enrolled member of the tribe, one being the homestead and the others designated as "surplus" lands. The remaining lands were to be divided among the members and were also designated as surplus lands. The homestead was made inalienable and nontaxable until otherwise provided by Congress. The surplus lands were inalienable for twenty-five years and nontaxable for a period of three years from the approval of the Act when allotted to Indians not holding certificates of competency. The Secretary of the Interior was authorized, in his discretion and at the request and upon the petition of any adult member of the Tribe, to issue to such member a certificate of competency authorizing him to sell and convey any of his lands other than homestead (which remained inalienable and nontaxable for twenty-five years or during the life of the allottee) if upon investigation, consideration, and examination of the request he should find the member fully competent and capable of transacting his own business and caring for his own individual affairs. Upon the issuance of a certificate of competency the surplus lands of such member became immediately subject to taxation, and the member was given the right to manage, control, and dispose of his lands the same as any citizen of the United States. The minerals.

underlying the allotted lands were reserved to the use of the Tribe for a period of twenty-five years. Mineral leases were to be made by the tribal council with the approval of the Secretary of the Interior, and the President of the United States was to determine the amount of royalties to be paid. The royalties, together with certain other tribal income, were to be distributed quarterly to the individual members of the Tribe, without restriction upon its use by them.

The Act of 1906 made no distinction in the distribution of royalties as between Indians having certificates of competency and those without such certificates. No control over the distributed funds was reserved by the Government as to either class. By Section 7 of the Act of 1912 it was provided that the "lands or funds of Osage tribal members" should not be "subject to any claim against the same arising prior to grant of a certificate of competency," and that the Act should not be construed so as to exempt any such property from liability for taxes. Although Section 4 of the Act of 1912 provides that nothing in the Act should be construed to change the right of the Osage Tribe in, or change or amend the provisions of the Act of 1906 in regard to oil, gas, coal, or minerals, it may be that Section 7 should be construed to apply to royalties so as to extend its protection to royalty shares of members not certified as competent, while exposing the royalty shares of those members who were certified as competent to all claims arising after such certification, to that extent restricting the former and emancipating the latter with respect to royalties as well as other tribal funds.

No further change was made in the law until the Act of 1921. That Act and the later one of 1925, while subsequent to the taxable period involved in this action, confirm the view that by the Acts of 1906 and 1912 Congress intended to completely emancipate the certificate-holding Indian with respect to the quarterly royalty payments. The Act of 1921 made no change as to distribution of the royalties to members holding certificates of competency, but by Section 4 it limited the payments to other members to $1,000 per quarter. The Act of 1925 again made no change as to certificate-holding members, but by Section 4 provided that if the Secretary of the Interior should find that one having more than one-half Indian blood was squandering or misusing his funds, his certificate might be revoked after notice and hearing, and thereafter his income should be subject to supervision and investment as provided in the Act for members not holding certificates. It is important to note, however, that the Indian's complete emancipation as to these particular funds while holding a certificate of competency was affirmed by the further provision in Section 4 recognizing the legality of transactions made and providing for the payment of indebtedness incurred prior to revocation. The status of an Indian holding a certificate of competency was not changed by the Act of 1929 except that under Section 3 thereof the Secretary of the Interior was required to pay to each enrolled Indian of less than one-half Osage blood one-fifth part of his proportionate share of accumulated funds and to pay the balance to such Indian on or before the expiration of ten years from the approval of the Act and to issue to him a cer-

tificate of competency. To this extent the discretion vested in the Secretary of the Interior by Section 5 of the Act of 1912 was modified.

As pointed out above, no distinction was made between the two classes of Indians in the Act of 1906 so far as the quarterly royalty payments were concerned, nor was any change made in the Act of 1912, unless the provision in Section 7 be construed to refer to royalties. By the Act of 1921, however, the status of the Indian not holding a certificate of competency was materially altered. Under Section 4 the quarterly distribution was limited to $1,000, to be paid under the supervision of the Superintendent of the Osage Agency, who was directed to invest in certain securities the remainder of such Indian's share after paying all his taxes. Section 1 of the Act of 1925 modified the above requirements by providing that if the Indian not holding a certificate so desired he might receive his entire income without supervision, subject to having restored the $1,000 limitation if the Secretary of the Interior should find that he was wasting or squandering his income. Section 6 of the Act also provided that thereafter no contract for debt with such an Indian should be valid unless approved by the Secretary of the Interior.

With the passage of the Act of 1908, after eighty years of training in schools, the manual arts, and agriculture provided for in various Acts and treaties, the process of educating the individual Indians in responsibility and their emancipation from the guardianship of the Government was continued and expanded. The evident purpose of the Act was to give to all members of the Tribe an op-

portunity to learn self-control through the responsibility of handling the funds distributed to them quarterly, and a still greater responsibility as to the allotted realty was given those Indians found to be fully competent to manage their own affairs. While it was found necessary later to resume control to some extent over the funds of the Indian to whom no certificate of competency had been issued, no change was made as to the competent Indian so long as he held his certificate; and so far as the funds here sought to be taxed are concerned, the petitioner was fully emancipated and no longer a ward of the Government.

APPENDIX B

Act of June 28, 1906, c. 3572, 34 Stat. 539:

CHAP. 3572. An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

* * * * *

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share therof in acres, as follows:

* * * * *

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: *Provided*, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and

shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

* * * * *

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided,* That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided,* That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: *And*

provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

* * * * * *

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

SEC. 4. That all funds belonging to the Osage tribe, and all moneys due, and all

moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Second. That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases and moneys received from the sale of town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interest, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with

the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

Approved, June 28, 1906.

APPENDIX C

Act of April 18, 1912, c. 83, 37 Stat. 86:

CHAP. 83. An Act Supplementary to and amendatory of the Act entitled "An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma," approved June twenty-eighth, nineteen hundred and six, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That until the inherited lands of the deceased members of the Osage Tribe of Indians shall be partitioned or sold the Secretary of the Interior be, and he hereby is, authorized to pay the taxes on said land out of any money due and payable to the heirs from the segregated decedent's funds in the Treasury of the United States.

SEC. 2. That the Secretary of the Interior be, and he hereby is, authorized, where the same would be to the best interests of Osage allottees, and the same is submitted to the Osage council for recommendation and approved by it, to permit the exchange of surplus allotments, or any portions thereof, of Osage allottees under such rules and regulations as he may prescribe and upon such terms as he shall approve. The Secretary shall have authority to do any and all things necessary to make these exchanges effective.

* * * * *

SEC. 4. That nothing herein shall be construed as in any way changing the rights of

the Osage Tribe in oil, gas, coal, and other minerals as fixed in the Osage Act of June twenty-eighth, nineteen hundred and six, or in any manner be construed to change or amend the provisions of said Act in regard to oil, gas, coal, or other minerals.

SEC. 5. That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

* * * * *

SEC. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be sub-

ject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage County, State of Oklahoma: *Provided further,* That nothing herein shall be construed so as to exempt any such property from liability for taxes.

SEC. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided,* That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

SEC. 9. The word "competent," as used in this Act, shall mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except his homestead.

* * * * *

Approved, April 18, 1912.

APPENDIX D

Act of March 3, 1921, c. 120, 41 Stat. 1249:

CHAP. 120. An Act To amend section 3 of the Act of Congress of June 28, 1906, entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the Act of June 28, 1906 (Thirty-fourth Statutes at Large, page 539), entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes," which reserves to the Osage Tribe the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is made in that Act is hereby amended so that the oil, gas, coal, or other minerals covered by said lands are reserved to the Osage Tribe for the period ending April 7, 1946: *Provided,* That all valid existing oil and gas leases on the 7th day of April, 1931, are hereby renewed upon the same terms and extended, subject to all other conditions and provisions thereof, until the 8th day of April, 1946, and as long thereafter as oil or gas is found in paying quantities, and the Secretary of the Interior and the Osage Council are hereby authorized and directed to offer for lease for oil and gas purposes all of the remaining portion of the unleased Osage land prior to April 8, 1931, offering the same annually at the rate of not less than one-tenth of the unleased area.

SEC. 2. That the bona fide owner or lessee of the surface of the land shall be compensated, under rules and regulations prescribed by the Secretary of the Interior in connection with oil and gas-mining operations, for any damage that shall accrue after the passage of this Act as a result of the use of such land for oil and gas mining purposes or out of damages to the land or crops thereon occasioned thereby, but nothing herein contained shall be construed to deny to the surface owner or lessee the right to appeal to the courts without the consent of the Secretary of the Interior, in the event he is dissatisfied with the amount of damages awarded him.

SEC. 3. That all members of the Osage Tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law, and all restrictions against alienation of their allotment selections, both surplus and homestead, of all adult Osage Indians of less than one-half Indian blood, are hereby removed, and the Secretary of the Interior shall, within four months after the passage of this Act, determine what members of said tribe are of less than one-half Indian blood, and their ages, and his determination thereof shall be final and conclusive. The homestead allotments of the members of the Osage Tribe shall not be subject to taxation if held by the original allottee prior to April 8, 1931.

SEC. 4. That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of com-

petency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year: *Provided further,* That all just existing individual obligations of adults not having certificates of competency outstanding upon the passage of this Act, when approved by the Superintendent of the Osage

Agency, shall be paid out of the money of such individual as the same may be placed to his credit in addition to the quarterly allowance provided for herein.

SEC. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross-production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: *Provided*, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further*, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only.

Approved March 3, 1921.

APPENDIX E

Act of February 27, 1925, c. 359, 43 Stat. 1008:

CHAP. 359. An Act To amend the Act of Congress of March 3, 1921, entitled "An Act to amend section 3 of the Act of Congress of June 28, 1906, entitled 'An Act of Congress for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes.'"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe of Indians in Oklahoma having a certificate of competency, his or her pro rata share, either as a member of the tribe or heir or devisee of a deceased member, of the interest on trust funds, the bonus received from the sale of oil or gas leases, the royalties therefrom, and any other moneys due such Indian received during each fiscal quarter, including all moneys received prior to the passage of this Act and remaining unpaid; and so long as the accumulated income is sufficient the Secretary of the Interior shall cause to be paid to the adult members of said tribe not having a certificate of competency $1,000 quarterly, except where such adult members have legal guardians, in which case the amounts provided for herein may be paid to the legal guardian or direct to such Indian in the discretion of the Secretary of the Interior the

total amounts of such payments, however, shall not exceed $1,000 quarterly except as hereinafter provided; and shall cause to be paid for the maintenance and education, to either one of the parents or legal guardians actually having personally in charge, enrolled or unenrolled, minor member under twenty-one years of age, and above eighteen years of age, $1,000 quarterly out of the income of each of said minors, and out of the income of minors under eighteen years of age, $500 quarterly, and so long as the accumulated income of the parent or parents of a minor who has no income or whose income is less than $500 per quarter is sufficient, shall cause to be paid to either of said parents having the care and custody of such minor $500 quarterly, or such proportion thereof as the income of such minor may be less than $500, in addition to the allowances above provided for such parents. Rentals due such adult members from their lands and their minor children's lands and all income from such adults' investments shall be paid to them in addition to the allowance above provided. All payments to legal guardians of Osage Indians shall be expended subject to the joint approval in writing of the court and the superintendent of the Osage Agency. All payments to adults not having certificates of competency, including amounts paid for each minor, shall, in case the Secretary of the Interior finds that such adults are wasting or squandering said income, be subject to the supervision of the superintendent of the Osage Agency: *Provided*, That if an adult member, not having a certificate of competency so desires, his entire income accumulating in the future from the sources herein specified may be paid to him without supervision, unless the Secre-

tary of the Interior shall find, after notice and hearing, that such member is wasting or squandering his income, in which event the Secretary of the Interior shall pay to such member only the amounts herein before specified to be paid to adult members not having certificates of competency. The Secretary of the Interior shall invest the remainder, after paying the taxes of such members, in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per centum of the appraised value of such real estate, and where the member is a resident of Oklahoma such investment shall be in loans on Oklahoma real estate, stock in Oklahoma building and loan associations, livestock, or deposit the same in banks in Oklahoma, or expend the same for the benefit of such member, such expenditures, investments, and deposits to be made under such restrictions, rules, and regulations as he may prescribe: *Provided*, That the Secretary of the Interior shall not make any investment for an adult member without first securing the approval of such member of such investment: *Provided further*, That at the beginning of each fiscal year there shall first be reserved and set aside, out of Osage tribal funds available for that purpose, a sufficient amount of money for the expenditures authorized by Congress out of Osage funds for that fiscal year. No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage Tribe of Indians who does not have a certificate of competency or who is of one-half or more Indian blood. * * *

* * * * * *

SEC. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

SEC. 4. Whenever the Secretary of the Interior shall find that any member of the Osage Tribe of more than one-half Indian blood, to whom has been granted a certificate of competency, is squandering or misusing his or her funds, he may revoke such certificate of competency after notice and hearing in accordance with such rules and regulations as he may prescribe, and thereafter the income of such member shall be subject to supervision and investment as herein provided for members not having certificates of competency to the same extent as if a certificate of competency had never been granted: *Provided*, That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior, or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for: *And provided further*, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of the issuance of any certificate of competency.

* * * * *

SEC. 6. No contract for debt hereafter made with a member of the Osage Tribe of Indians not having a certificate of competency, shall have any validity, unless approved by the Secretary of the Interior. In addition to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his discretion to pay, out of the funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence.

SEC. 7. Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided*, That this section shall not apply to spouses under existing marriages.

Approved, February 27, 1925.

APPENDIX F

Act of March 2, 1929, c. 493, 45 Stat. 1478:

CHAP. 493. An Act Relating to the tribal and individual affairs of the Osage Indians of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act of Congress of March 3, 1921 (Forty-first Statutes at Large, page 1249, relating to the Osage Indians of Oklahoma, be, and the same is hereby, amended to read as follows:

"That all that part of the Act of June 28, 1906 (Thirty-fourth Statutes at Large, page 539), entitled 'An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' which reserves to the Osage Tribe the oil, gas, coal, or other minerals, covered by the lands for the selection and division of which provision is made in that Act is hereby amended so that the oil, gas, coal, or other minerals, covered by said lands are reserved to the Osage Tribe, until the 8th day of April, 1958, unless otherwise provided by Act of Congress, and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law, after reserving such amounts as are now or may hereafter be authorized by Congress for specific purposes.

"The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until January 1, 1959, unless otherwise provided by Act of Congress.

"The Secretary of the Interior and the Osage tribal council are hereby authorized and directed to offer for lease for oil, gas, and other mining purposes any unleased portion of said land in such quantities and at such times as may be deemed for the best interest of the Osage Tribe of Indians: *Provided*, That not less than twenty-five thousand acres shall be offered for lease for oil and gas mining purposes during any one year: *Provided further*, That as to all lands hereafter leased, the regulations governing same and the leases issued thereon shall contain appropriate provisions for the conservation of the natural gas for its economic use, to the end that the highest percentage of ultimate recovery of both oil and gas may be secured: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease for oil or gas or other minerals, but all such leases shall continue as long as gas, oil, or other minerals are found in paying quantities.

"Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided*, That the tax-exempt land of any such Indian allotee, heir, or devisee

shall not at any time exceed one hundred and sixty acres."

* * * * *

SEC. 3. That section 1 of the Act of Congress of February 27, 1925 (Forty-third Statutes at Large, page 1008), is hereby amended by adding thereto the following:

"The Secretary of the Interior be, and is hereby, authorized, in his discretion, under such rules and regulations as he may prescribe, upon application of any member of the Osage Tribe of Indians not having a certificate of competency, to pay all or any part of the funds held in trust for such Indian: *Provided,* That the Secretary of the Interior shall, within one year after this Act is approved, pay to each enrolled Indian of less than half Osage blood, one-fifth part of his or her proportionate share of accumulated funds. And such Secretary shall on or before the expiration of ten years from the date of the approval of this Act, advance and pay over to such Osage Indians of less than one-half Osage Indian blood, all of the balance appearing to his credit of accumulated funds, and shall issue to such Indian a certificate of competency: *And provided further,* That nothing herein contained shall be construed to interfere in any way with the removal by the Secretary of the Interior of restrictions from and against any Osage Indian at any time."

* * * * *

SEC. 5. The restrictions concerning lands and funds of allotted Osage Indians, as provided in this Act and all prior Acts now in force, shall apply to unallotted Osage Indians born since July 1, 1907, or after the passage of this Act, and to their heirs of Osage Indian blood, except that the provisions of

section 6 of the Act of Congress approved February 27, 1925, with reference to the validity of contracts for debt, shall not apply to any allotted or unallotted Osage Indian of less than one-half degree Indian blood: *Provided*, That the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians of less than one-half degree Indian blood not having a certificate of competency shall not be subject to forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to grant a certificate of competency to any unallotted Osage Indian when in the judgment of the said Secretary such member is fully competent and capable of transacting his or her own affairs.

SEC. 6. All just existing obligations of restricted Osage Indians outstanding January 1, 1929, when approved by the Superintendent of the Osage Agency, shall be paid out of the money of such Indian appearing to his credit, in addition to his quarterly allowances: *And provided further*, That nothing herein contained shall be construed to interfere in any way with the granting of a certificate of competency by the Secretary of the Interior, as provided for by existing law, at any time after the payment of all of his or her just debts which have been presented to and approved by the Superintendent of the Osage Indian Agency.

* * * * *

Approved, March 2, 1929.

APPENDIX G

The Osage Allotment Act of 1906 made no provision for the payment to the individual Indian, competent or otherwise, of any portion of the trust fund derived chiefly from the sale of the Kansas lands and covered by Section 4, First, of that Act. Under Section 5 of the Act of 1912 the Secretary of the Interior was authorized in his discretion and under such rules and regulations as he might prescribe to pay to Osage allottees their pro rata share of such trust fund. On June 26, 1912, the Secretary of the Interior issued rules and regulations relative to the paying over of these trust funds, the material portions of which are as follows:

Regulations for Applications for Osage Funds

(Under sec. 5 of the act of Apr. 18, 1912 (37 Stat. L., 88), Public No. 125)

* * * * *

In order to put into effect the provisions of the aforesaid section 5 the following rules and regulations governing applications for moneys, original and inherited, segregated under the Osage act of June 28, 1906 (34 Stat. L., 539), and proceeds of sale of inherited lands paid into the Treasury under section 6 of the Osage act of April 18, 1912, are hereby set forth:

Payment in full or in part of any application under section 5 is entirely discretionary with the Secretary of the Interior, under rules and regulations prescribed by him. The facts in each case will be investigated and reported upon by Government officers, and the services of any person in the capacity of attorney or agent are entirely unnecessary.

CLASS 1. COMPETENT INDIANS

PREPARATION OF APPLICATION

The applicant (unless an absentee) must be over the age of 21 years and must make his request in person to the superintendent or one of his representatives, giving the reasons for applying, and stating whether a part or all the money to his credit is desired, and whether he has been induced by any person to make the application. The superintendent will prepare a claim for the Indian's signature, which signature must be witnessed by an employee of the office or sworn to before the superintendent. The statement of the Indian will then be incorporated in the superintendent's report and recommendation in a space provided for that purpose.

PROOF OF COMPETENCY

Any Indian who has received a certificate of competency will be considered prima facie competent to handle his trust funds, but further investigation may be made in any case.

One who has not received a certificate of competency, but who has made good use of all moneys paid to him and has properly used the lands and rentals under his control belonging to his minor children may be considered competent to handle his trust funds.

CLASS 2. ADULTS NEITHER AGED, PHYSICALLY DISABLED, NOR INCOMPETENT TO A DEGREE REQUIRING LEGAL GUARDIANSHIP

MAKING OF APPLICATION

The applicant (unless an absentee) must make his request in person to the superintendent or one of his representatives, giving

the reason why it is made and agreeing to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs.

His statement will be incorporated in the superintendent's report on his application, which application will contain the stipulation referred to.

The superintendent will show in his report whether it would be for the best interests and welfare of the allottee to approve an application for all or any part of his trust funds.

* * * * * * *

Each application will contain a clause stipulating that the Indian, so far as that particular application is concerned, will abide by the decision of the department if a part only of the amount applied for be allowed. The attention of each applicant will be called to this stipulation.

Approved, June 26, 1912.

R. G. VALENTINE,
Commissioner.

SAMUEL ADAMS,
First Assistant Secretary.

It will be noted under the foregoing regulations that the moneys were paid over to the Indian having a certificate of competency, or one considered competent to handle his trust funds, without any restrictions as to supervision over expenditure. As to the second class, including adult Indians without certificates of competency who were not considered competent to handle their trust funds but who were not aged, physically disabled, or in-

competent to a degree requiring legal guardianship, the moneys paid over were required to be deposited in a bank to their credit and expended under the supervision of the superintendent of the Agency.

The general authority for supervision and control by the Government over the expenditure of funds belonging to individual unemancipated Indians is found in the various statutes. Typical of such statutory authority is the right to supervise expenditures of the proceeds of the sale of allotted restricted lands of incompetent Indians under the Act of March 1, 1907, c. 2285, 34 Stat. 1018, U. S. C., Title 25, Section 405; of funds of the mentally or physically incapable under Section 2, Act of March 2, 1907, c. 2523, 34 Stat. 1221, as amended by Act of May 18, 1916, c. 125, 39 Stat. 128, U. S. C., Title 25, Section 121; of proceeds from sale of allotted lands of minors or other incompetent Indians under Section 1, Act of May 29, 1908, c. 216, 35 Stat. 444, U. S. C., Title 25, Section 404; of proceeds of lease of allotments held under trust patents, and proceeds of sale of timber cut from allotted restricted lands under Sections 4 and 8, respectively, of the Act of June 25, 1910, c. 431, 36 Stat. 856, 857, U. S. C., Title 25, Sections 403, 406. See also *Starr* v. *Campbell*, 208 U. S. 527; *Parker* v. *Richard*, 250 U. S. 235; *United States* v. *Brown* (C. C. A. 8th), 8 F. (2d) 564, certiorari denied, 270 U. S. 644; *Tomkins* v. *Campbell*, 129 Wis. 93.

Regulations were issued by the office of Indian Affairs from time to time, with the approval of the Secretary of the Interior, relative to the supervision of the expenditure of individual Indian moneys. The regulations of April 1, 1904, in effect

at the time of the passage of the Osage Allotment Act of 1906, were as follows:

> 301. Moneys coming into the hands of agents for rents, leases, and sales of property belonging to individual Indians will be designated as "individual Indian moneys." They are not to be covered into the United States Treasury, but accounted for as other funds, and paid, upon proper vouchers, directly to the Indians to whom they belong. (*See sec. 348.*)
>
> 348. Under the act of July 1, 1898, which provides that Indian agents "shall account for all moneys coming into their hands as custodians from any source whatever, and be responsible therefor under their official bonds," such agents are required to include in their regular accounts moneys received from the sale of property belonging to Indians, and to furnish proper vouchers for all disbursements therefrom. (*Dig. Dec. Comp., p. 12. See sec. 301.*)
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> * * * * * *
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> 355. A properly executed voucher must be furnished for each and every expenditure, and the latter must be authorized by the Secretary of the Interior before credit therefor will be allowed.

Under the foregoing the Indian agent had the custody of individual Indian moneys and paid them out directly to the Indians upon vouchers which could only be issued for expenditures authorized by the Secretary of the Interior.

Under the Act of April 30, 1908, c. 153, 35 Stat. 73, U. S. C., Title 25, Section 151, Indian agents were authorized to deposit individual Indian moneys in national banks furnishing approved security. In 1910 under Section 1 of the Act of June

25, 1910, *supra*, U. S. C., Title 25, Section 372, such authority was extended to include banks other than national banks. Subsequently the regulations concerning the handling of individual Indian moneys were considerably amplified, and those approved on July 14, 1913, with the amendments thereto, were in effect during the taxable period involved in this case. Under these regulations individual Indian moneys were deposited in the banks to the credit of the individual Indian, subject to his check, which also had to be signed and approved by the Indian agent. The pertinent provisions of such regulations were as follows:

REGULATIONS GOVERNING THE HANDLING OF INDIVIDUAL INDIAN MONEY

GENERAL

1. Individual Indian moneys are funds, regardless of derivation, which belong to individual Indians, and which come into the custody of a disbursing officer.

2. Requests for authority to approve checks of Indians who have individual Indian money deposited to their credit shall be made upon Form 5–139, in duplicate, carefully prepared for approval by the Commissioner of Indian Affairs, except that the date of approval and the number are to be left blank. All requests for authority must show clearly the necessity for the expenditure proposed, and, where it is proposed to pay direct to depositor for his unrestricted use, the competency of the depositor to handle the amount requested.

* * * * *

5. (A) Disbursing officers are hereby authorized to turn over $100 or less without

restriction to adult Indians, who are reasonably competent. Payments under this authority are not to exceed $100 in any one month nor $500 in any one year, this section to be cited as authority for all such disbursements. The purpose of such distribution to adult Indians who are not incapacitated on account of age or physical or mental infirmity is to the end that they may be encouraged to assume personal responsibility, and acquire self-reliance and a practical business experience that will enable them to become more independent and progressive members of the community. (Amended September 24, 1921.)

5. (B) Authority is hereby granted disbursing officers handling individual Indian money to turn over to any Indian, upon the issuance of a patent in fee to said Indian, all individual Indian money on deposit to his or her credit, and to assist in obtaining, as speedily as possible, payment of said Indian's share of tribal trust funds which may be held in the Treasury of the United States. (Effective March 25, 1918.)

6. Attention of superintendents is called to the fact that one of their chief duties is to see that every Indian is well established in a permanent and substantial home built upon land to which the individual whose money is being expended may ultimately expect to obtain a fee-simple title, that is to say, upon his own allotment or land to which he has been declared sole heir by the Secretary of the Interior under the act of June 25, 1910.

* * * * *

9. Superintendents are authorized to make expenditures from accounts of adult Indians for all agricultural needs, including seed and stock, under the authority of this

section. Expenditures under this section shall be reported in quarterly accounts, and this section referred to as authority for the expenditure. (Amended March 6, 1915.)

9. (A) All emergency needs of adult Indians not provided for in other sections of these regulations may be met by the superintendent without procuring specific authority. Expenditures under this section shall be reported in the quarterly accounts and this section referred to as the authority for the expenditure. (Amended July 3, 1916.)

9. (B) Superintendents are authorized to expend funds of adult depositors for use in constructing, repairing and equipping houses, barns, out-buildings, fences, corrals, wells, and other similar necessary improvements when placed upon their allotments. Expenditures under this section shall be reported in the quarterly accounts, and this section referred to as the authority for the expenditure. (Effective March 6, 1915.)

* * * * * * *

13. A disbursing officer may pay in cash to a minor or his parent, custodian, or guardian, or disburse for the benefit of a minor who is in regular attendance in a public mission, contract, government reservation, boarding, or day school, sums not greater than $25 in any one month, the aggregate of checks and payments for any one year not to exceed $100. No funds belonging to minors who are not in regular attendance at school shall be paid to them or their parents, custodians, or guardians, or disbursed for their benefit, except under approved authority on Form 5–139, in accordance with paragraph 2. (Amended March 11, 1914.)

* * * * * * *

18. Persons who extend credit to Indians do so at their own risk. All Indians should be urged to pay any of their just and legitimate debts as far as they may be able.

* * * * *

39. All checks must show on the face thereof the purpose for which drawn. For example, if a direct payment is made, it should be noted on the check as "Cash payment," or if expenditures are made for the benefit of the Indian, the following notation should appear: "Seed and implements, supervised," "Groceries, clothing, etc., supervised," or "Doctor and hospital treatment," "Payment principals of loan," etc.

* * * * *

42. Individual Indian moneys, whether or not deposited in bank to owner's credit, are in the officer's custody. (See par. 1.)

43. At no time will officers cover individual Indian moneys into the Treasury, unless specifically directed to do so.

* * * * *

105. Deposits in bank to the credit of individual Indians may be made either subject to check countersigned by the officer or for a definite time, accordingly as the Indian's circumstances make the more desirable.

* * * * *

July 12, 1913.

CATO SELLS, *Commissioner.*

July 14, 1913.

A. A. JONES,
First Assistant Secretary.

APPENDIX H

Internal Revenue Cumulative Bulletin II–2, p. 62:

ARTICLE 31: WHAT INCLUDED IN GROSS INCOME.

(Also Section 219, Article 345; Section 223, Article 401; Section 225, Article 422)

II–33–1192
I. T. 1834

REVENUE ACTS OF 1916, 1917, 1918, AND 1921

All gains, profits, and income accruing to the members of the Osage Tribe, Oklahoma, from their surplus allotments and from their shares as members in the mineral estate reserved to the tribe are subject to the income taxes imposed by the Revenue Acts of 1916, 1917, 1918, and 1921. The income accruing to such Indians from homestead allotments conveyed to them by the Act of 1906 will not be subject to income taxation prior to April 8, 1931, if such homestead is held by the original allottees.

The income accruing to the United States as trustee is distributable regularly within the meaning of section 2(b) of the Revenue Act of 1916 (which is applicable to the taxable years 1916 and 1917) and is distributable periodically within the meaning of sections 219(a)4 of the Revenue Acts of 1918 and 1921. Taxes to be asserted are to be computed upon the individual share of

each member of the tribe. Since the shares of the members having certificates of competency are paid to them without restriction, they should include such income in the individual returns filed by them. With respect to those persons who do not have certificates of competency and minors, a return of the entire shares of such persons should be made by the United States as guardian.

The following questions have been presented for consideration:

(1) Is the income accruing to Indians of the Osage Tribe, Oklahoma, derived from "restricted" property subject to the income tax levied by the Internal Revenue Acts of 1916, 1917, 1918, and 1921?

(2) If so, should the Osage Tribe as a unit, rather than individual allottees thereof, file a separate tax return in order to take advantage of authorized allowances or deductions for depletion and depreciation on oil and gas wells?

The various Revenue Acts referred to above impose the income tax levied thereunder upon the entire net income (as defined in such Acts) of every individual a citizen or resident of the United States. See section 1 of the Revenue Act of 1916, sections 1 and 2 of the Revenue Act of 1917, and sections 210 and 211 of the Revenue Acts of 1918 and 1921. The members of the Osage Tribe of Indians of Oklahoma, whether or not owning restricted property, come within the purview of the language used therein. Indians as such are not exempted from liability under the provisions of the general revenue laws. *The Cherokee Tobacco* (11 Wall. 616). The members of the Osage Tribe are, therefore, subject to the taxes

mentioned, unless there is some special provision under the terms of which such taxes are not to be asserted against them.

In the Act of June 28, 1906 (34 Stat. 539), which provided for the allotment in severalty of the lands formerly constituting the reservation of the Osage Tribe, now Osage County, Okla., distinct provisions are to be found with respect to the taxation of the lands so allotted. The Act referred to provided for the conveyance to each of the several members of the tribe of three selections of 160 acres each and provided also for an equal division of any lands which might remain after such selections. Each member was permitted to designate which of his three selections should be a homestead. The other selections of the member, together with his share of the remaining lands to be divided, were designated as surplus lands. Pursuant to the provisions of the Act, the homestead allotment was made inalienable and nontaxable until otherwise directed by Congress, unless the Secretary of the Interior should, upon application of a member, issue to him a certificate of competency, as provided for in such Act, in which case the homestead allotment of such member was made inalienable and nontaxable for a period of 25 years or during the life of such person. By section 3 of the Act of March 3, 1921 (41 Stat. 1249), the restriction against the alienation of the homestead allotments of all members of less than one-half Indian blood were removed. It was further provided that the homestead allotments of *all the members* of the Osage Tribe should not be subject to taxation, if held by the original allottee, prior to April 8, 1931. With respect to the surplus lands, the Act of June 28, 1906, provided that all such

lands, to the extent of the interest therein conveyed to the Osage allottees, should be taxable at the expiration of three years from the date of the approval of the Act (notwithstanding a restriction against the alienation thereof for a period of 25 years or until the issuance of a certificate of competency) unless prior to the expiration of such three years a member should receive a certificate of competency or a member should die, in either of which cases the surplus lands of such member should become taxable upon the happening of such event.

In accordance with the express provisions of the legislation of Congress, the homestead allotment, to the extent of the interest therein conveyed to each member of the Osage Tribe by the Act of 1906, is nontaxable if held by the original allottee until April 8, 1931. A tax upon the income from such interest in the land would be equivalent to a tax upon the interest itself. See *Pollock* v. *Farmers Loan & Trust Co.* (157 U. S. 429). Accordingly, until April 8, 1931, income accruing to members of the Osage Tribe from the homestead allotments conveyed to them by the Act of 1906 is not taxable, if such homestead is held by the original allottee. The surplus allotment of any such members became taxable upon the expiration of three years from the date of the approval of the Act of 1906 (June 28, 1906), provided a certificate of competency was not issued to such member prior thereto or such member did not die before the expiration of such period. It may be stated, therefore, that the surplus lands of the Osage Indians became taxable not later than June 28, 1909. The income derived from the surplus lands is taxable under the Revenue Acts in ques-

tion, since Congress has expressly provided that such lands would in any event be taxable at the expiration of three years from June 28, 1906.

The oil, gas, coal, and other minerals underlying the alloted lands of the Osage Tribe were, by sections 3 and 5 of the Act of 1906, reserved to the Osage Tribe for a period of 25 years from April 8, 1906. It was provided that at the expiration of such period of 25 years such minerals or the rights thereto should become the property of the individual owners of the land, unless prior to the expiration of such period Congress should otherwise direct. By the Act of March 3, 1921, such minerals or the rights thereto were further reserved to the tribe for an additional period of 15 years, the reservation being made to end April 7, 1946.

By reason of the reservation described, the minerals contained in the allotments did not pass by the allotment to the individual members of the Osage Tribe. See *Board of Commissioners* v. *United States* (216 Fed. 883). Such interest remained tribal property and the title of the Indians thereto remained in the tribe as is the case where property is held by an Indian tribe for the common use and equal benefit of all the members. See *Cherokee Nation* v. *Hitchcock* (187 U. S. 294, 307). The tax exemptions provided for in the case of homestead and surplus-land allotments do not appear to have any application to the oil, gas, coal, and other minerals underlying the allotted lands, and there appears to be no other statutory provision which would exempt such minerals from taxation. The Act of March 3, 1921, permitted the State of Oklahoma to levy its gross-production tax upon all oil and

gas produced in Osage County. By the same Act Congress made an additional levy of a sum equal to 1 per centum of the amount rereceived by the Osage Tribe as royalties from the production of oil and gas, such levy to be used for the construction and maintenance of roads and bridges in Osage County. These instances are indicative of the power of Congress to subject such tribal property to taxation.

As stated before, Indians as such are not exempt from liability under the provisions of the general revenue laws of the United States. If they are to be exempted from such liability there must be special language in such general revenue laws excepting them. (*The Cherokee Tobacco, supra.*) Since, therefore, Congress, having plenary power over Indian affairs, has made no provisions whereby the reserved mineral estate of the Osage Tribe shall be excepted from taxation by the Federal Government, since Congress has not excepted the members of the Osage Tribe from liability under the income-tax provisions of the various revenue Acts in question, and since such persons clearly come within the general classes of persons upon which such taxes are imposed, it accordingly appears that it was the intention of Congress that any income accruing to the members of the Osage Tribe from minerals underlying allotted lands would be subject to the provisions of the various revenue Acts.

It is therefore held that all gains, profits, and income accruing to the members of the Osage Tribe, Oklahoma, from their surplus allotments and from their shares as members in the mineral estate reserved to the tribe are subject to the income taxes imposed by

the Revenue Acts of 1916, 1917, 1918, and 1921. The income accruing to such Indians from homestead allotments conveyed to them by the Act of 1906 will not be subject to income taxation prior to April 8, 1931, if such homestead is held by the original allottee.

By reason of section 4 of the Act of 1906, all funds then belonging to the Osage Tribe and all moneys due and to become due to the tribe were directed to be held in trust by the United States for a period of 25 years from and after January 1, 1907. It was directed that such funds should be segregated into individual shares as soon after January 1, 1907, as practicable and placed to the credit of the individual members of the tribe or their heirs at interest and that such interest should be paid quarterly to such members or their heirs. In respect, however, of all moneys received from oil, gas, coal, and other minerals, from the sale of town lots, and from grazing lands, it was directed that the amount placed to the individual credit of the members should be paid to such members quarterly in the same manner as the interest on their moneys held in trust for the tribe, thus treating such receipts as distributable income. It was provided that at the end of 25 years the pro rata share of the members in all the funds of the tribe so placed to the individual credit of such members should be distributed to them. It will thus be noted that a distribution of all the Osage trust funds was directed to be made by the Act of 1906 and that the United States was made the trustee of the pro rata share of such individual member or his heirs. It will thus be seen that all the moneys constituting the corpus of the Osage trust has been distributed to the individual

members by the placing of the same to the individual credit of such members. The tribal title remains only as to the reserved mineral interest. As noted above, the income therefrom is distributable quarterly to the individual members. Section 4 of the Act of March 3, 1921, modified slightly the procedure as to the handling of the income from the mineral interest and from the trust funds in that the Secretary of the Interior was directed to retain and invest so much of the income of the members not having certificates of competency as exceeded $1,000 quarterly and so much of the income of minors as exceeded $500 quarterly. The United States is, therefore, made trustee of the mineral interest for the tribe as a body, the income thereof being distributable to the individual members of the tribe quarterly and payable to them at such time with the exceptions indicated. The United States is also trustee for the individual members of the tribe for their pro rata shares of the funds directed to be held in trust for 25 years, the interest upon which is distributable quarterly, and payable at such time, except as otherwise indicated.

The income of such a trust is distributable regularly within the meaning of section 2(b) of the Revenue Act of 1916 (which is applicable to the taxable years 1916 and 1917) and is distributable periodically within the meaning of sections 219(a)4 of the Revenue Acts of 1918 and 1921. Taxes to be asserted are, therefore, to be computed upon the individual share of each member of the tribe. Since the shares of the members having certificates of competency are paid to them without restriction, they should include such income in the individual re-

turns filed by them. With respect to those persons who do not have certificates of competency and minors, a return of the entire shares of such persons should be made by the United States as guardian.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 81.—October Term, 1930.

Henry Choteau, Petitioner, *vs.* David Burnet, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 25, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner is a member of the Osage tribe of Indians, duly enrolled as such under the Act of June 28, 1906,[1] and holds a certificate of competency issued March 5, 1910, pursuant to that Act. He owns his own original allotment of the tribal lands, and has inherited from a deceased member a one-half interest in the latter's allotment, but nothing in this case turns on his ownership of these lands. He also owns his own original share in the tribal revenues, and, by inheritance from a deceased member, one-half of the interest in those revenues, to which that member would be entitled if living.

In the years 1918, 1919 and 1920 petitioner's entire income was received from these one and one-half shares in the tribal income from oil and gas leases made by the tribe under the authority of the Act. The leases were on a portion of the lands bought by the United States with money belonging to the tribe, thereafter held in trust for it, and subsequently allotted to its members as directed by the Act. But in the division or allotment of the tribal lands the oil, gas and other minerals therein were expressly reserved to the tribe for a period of twenty-five years,[2] now extended to April 8, 1958.[3] Provision was made for the leasing of such minerals by the tribal council, with the approval of the Secretary of the Interior,[4] and the income from such leases is to be placed in the Treasury of the United States to the credit of the members of the tribe

[1] C. 3572, 34 Stat. 539.
[2] § 3, Act of 1906, *supra*.
[3] 45 Stat. 1478.
[4] § 3, Act of 1906, *supra*.

and distributed among them quarterly.[5] This was the source of the petitioner's income.

The petitioner paid income taxes in each of the years mentioned. Upon the receipt of a deficiency letter from the Commissioner of Internal Revenue he instituted a proceeding before the Board of Tax Appeals in which he claimed that he owed no deficiencies, but was entitled to a refund of the amounts theretofore paid because he was exempt from income tax on the sums received. The Board's decision was for respondent,[6] and was affirmed by the Circuit Court of Appeals.[7] This Court granted certiorari.[8]

The petitioner urges several arguments in support of the claim that he is not liable for tax under the Revenue Act of 1918. These may conveniently be grouped into two main contentions: First, that the statute evidences no intent to tax petitioner on such income, and second, that if its language is broad enough to cover his case, his status or the nature of the income, requires a holding that he is exempt.

The language of Sections 210 and 211 (a)[9] subjects the income of "every individual" to tax. Section 213 (a)[10] includes income "from any source whatever". The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.

But it is said that as to the income here taxed petitioner is exempt because of his status as an Indian. This assertion requires a reference to the policy of the government with respect to the Indians. No provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property. The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included im-

[5] § 4, First and Second, and § 6, Act of 1906, *supra*.
[6] 14 B. T. A. 1254.
[7] 38 F. (2d) 976.
[8] 281 U. S. 714.
[9] 40 Stat. 1062.
[10] 40 Stat. 1065.

posing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes.[11] Pursuant to this policy the act of 1906 directed the allotment to each member of the Osage tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee. After setting apart such homestead to each, the surplus lands were all to be equally divided and allotted amongst the members. Section 2, Seventh, of the act provides that the Secretary of the Interior, after due investigation, may issue certificates of competency to members of the tribe. It declares that "upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member (with exceptions not here material) shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."[12] Since 1910, when he received his certificate, petitioner has therefore been taxable upon his allotted lands, except his homestead, and they have been freely alienable.

There are provisions in the act of 1906 with respect to the holding, payment and administration of the royalty shares of members who do not have certificates of competency, but with these we are not concerned. The shares of royalty of those holding such certificates are to be paid to them quarterly.

The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. His share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been,

[11] See *United States* v. *Nice*, 241 U. S. 591, 598; *United States* v. *Waller*, 243 U. S. 452, 459; *McCurdy* v. *United States*, 246 U. S. 263, 269; *Shaw* v. *Oil Corporation*, 276 U. S. 575, 579.

[12] Section 4 of the Act of February 27, 1925, c. 359, 43 Stat. 1008, authorizes the revocation of a certificate held by one of more than one-half Indian blood, if the Secretary of the Interior shall find that the holder is squandering or misusing his or her funds. The revocation is not to affect the legality of any transactions theretofore made by reason of the issuance of a certificate, and all debts existing at the time of revocation are to be paid by the Secretary or his representative out of the income of the member. This section has no bearing upon the present case.

with respect to the income in question, fully emancipated. (Compare *United States* v. *Waller, supra.*) It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. *Work* v. *Mosier,* 261 U. S. 352; *Work* v. *Lynn,* 266 U. S. 161. The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by §§ 210 and 211 (a) must fail.

It remains to consider whether there is anything in the nature of the income itself making it necessary to exempt it from the broad language of the Revenue Act. It is suggested by petitioner that the sums received were gifts and not income. In view of the facts above recited this argument is without substance. It is further insisted that since the royalties are not taxable, so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. (See *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601.) Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power (*Gillespie* v. *Oklahoma,* 257 U. S. 501; *Shaw* v. *Oil Corporation, supra*) on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject matter. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Shaw* v. *Oil Corporation, supra.* But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax. (Compare *McCurdy* v. *United States, supra.*) There is, therefore, nothing in the nature of the income which excepts it from the effect of § 213 (a) of the Revenue Act of 1918.

Affirmed.